5-21-2009

Hall v. State Clerk's Record v. 1 Dckt. 35055

LAW CLERK Vol. 1 of 241

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

ERICK VIRGIL HALL,

PETITIONER-APPELLANT,

vs.

STATE OF IDAHO,

RESPONDENT.

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for ADA County

Hon THOMAS F. NEVILLE, *District Judge*

MOLLY HUSKEY
State Appellate Public Defender

Attorney for Appellant

LAWRENCE G. WASDEN
Attorney General

Attorney for Respondent

VOLUME I

35055

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	Supreme Court Case No. 35055

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE THOMAS F. NEVILLE

STATE APPELLATE PUBLIC DEFENDER	LAWRENCE G. WASDEN
ATTORNEY FOR APPELLANT	ATTORNEY FOR RESPONDENT
BOISE, IDAHO	BOISE, IDAHO

TABLE OF CONTENTS.....PAGE NO.

VOLUME I

TABLE OF CONTENTS.....PAGE NO.

VOLUME II

VOLUME III

TABLE OF CONTENTS.....PAGE NO.

TABLE OF CONTENTS.....PAGE NO.

VOLUME IV

TABLE OF CONTENTS.....PAGE NO.

VOLUME V

TABLE OF CONTENTS.....PAGE NO.

VOLUME VI

TABLE OF CONTENTS.....PAGE NO.

VOLUME VII

TABLE OF CONTENTS.....PAGE NO.

VOLUME VIII

TABLE OF CONTENTS.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

INDEX TO THE CLERK'S RECORD.....PAGE NO.

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/1/2005	NEWC	CCBLACJE	New Case Filed	Thomas F. Neville
		CCBLACJE	Post Conviction Relief Filing	Thomas F. Neville
3/2/2005	CERT	CCBLACJE	Certificate Of Mailing	Thomas F. Neville
3/25/2005	RSPS	CCMONGKJ	St Rsps To Post Conv Relf,st Motn To Dismiss	Thomas F. Neville
4/13/2005	RSPS	CCRIVEDA	Response To States Response To Post Conv Relf	Thomas F. Neville
9/7/2005	MOTN	CCMARTLG	Motion For Petnr Access Grand Jury Transcrpts	Thomas F. Neville
	HRSC	CCMARTLG	Hearing Scheduled - Motn Accss Trns (10/03/2005) Thomas Neville	Thomas F. Neville
10/3/2005	HRHD	DCELLISJ	Hearing result for Hearing Scheduled held on 10/03/2005 01:30 PM: Hearing Held Motn Accss Trns	Thomas F. Neville
10/31/2005	STIP	CCGROSPS	Stip For Release Of Jury Quest. & Add To The	Thomas F. Neville
	MISC	CCGROSPS	Reporters Transcript	Thomas F. Neville
11/15/2005	ORDR	DCELLISJ	Order Allowing Petitioner Access To & Poss	Thomas F. Neville
	CONT	DCELLISJ	Of G/j Transcripts Sub. To Conditions	Thomas F. Neville
	ORDR	DCELLISJ	Order For Preparation Add'l Transcripts	Thomas F. Neville
1/5/2006	MEMO	CCTHIEBJ	Memorandum Of Law In Support Of Motion	Thomas F. Neville
	MOTN	CCTHIEBJ	Motion For Discovery	Thomas F. Neville
1/19/2006	OBJT	CCCHILER	State's Objection to the Motion for Discovery	Thomas F. Neville
1/20/2006	MOTN	DCELLISJ	Motion To Reconsider oral orders re: ex parte procedures for expert access and strictions on juror contact	Thomas F. Neville
	MEMO	DCELLISJ	Memorandum In support of Motion to Reconsider	Thomas F. Neville
1/24/2006	MOTN	DCELLISJ	Motion For the Court to adopt petitioner's proposed scheduling order	Thomas F. Neville
2/8/2006	HRSC	DCELLISJ	Hearing Scheduled (Motion 02/15/2006 02:00 PM)	Thomas F. Neville
	NOTC	DCELLISJ	Notice of hearing on Motion to Reconsider	Thomas F. Neville
2/15/2006	HRHD	DCELLISJ	Hearing result for Motion held on 02/15/2006 02:00 PM: Hearing Held	Thomas F. Neville
3/1/2006	LODG	CCMARTLG	Lodged State's Memo in Support of the State's Objection to the Motn for Discovery	Thomas F. Neville
3/16/2006	MOTN	CCTHIEBJ	Ex Parte Motion For Expert Access To Petitioner	Thomas F. Neville
3/28/2006	MOTN	CCMARTLG	State's Motion in Limine to Preclude Depositions Without Court Order	Thomas F. Neville
	NOTH	CCMARTLG	Notice Of Hearing Motn in Limine to Preclude Depositions Without Court Order (6-23-06 @ 9 am)	Thomas F. Neville
	HRSC	CCMARTLG	Hearing Scheduled (Motion 06/23/2006 09:00 AM) State's Motn in Limine to Preclude Depositions Without Court Order	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
3/31/2006	MOTN	CCMARTLG	Motion for Issuance of Subpoenas for Depositions and Subpoenas Duces Tecum for Production of Documents	Thomas F. Neville
4/17/2006	AMEN	CCMARTLG	Amended Petn for Post-Conviction Relief	Thomas F. Neville
5/15/2006		DCELLISJ	Notice Of Amended Hearing for all motions currently set for June 23, 2006	Thomas F. Neville
5/24/2006	AMEN	DCELLISJ	Addendum to Amended Petition for Post-Conviction Relief	Thomas F. Neville
5/31/2006	RSPS	CCMARTLG	State's Response to the Amended Petn for Post Conviction Relief and State's Motn to Dismiss	Thomas F. Neville
6/2/2006	MOTN	DCELLISJ	Motion To suspend post-conviction proceedings	Thomas F. Neville
	MISC	DCELLISJ	Second Addendum to Amended Petition for post-conviction relief	Thomas F. Neville
	MOTN	DCELLISJ	Renewed motion for access to completed questionnaires	Thomas F. Neville
	NOTC	DCELLISJ	Notice Of Hearing, June 20, 2006 @ 1:30 p.m.	Thomas F. Neville
6/7/2006	MOTN	CCMARTLG	Motion for Order to Conduct Medical Testing and Order for Transport	Thomas F. Neville
	NOTH	CCMARTLG	Notice Of Hearing Motn Order to Conduct Medical Testing and Order for Transport (6-20-06 @ 1:30 pm)	Thomas F. Neville
6/12/2006	NOTC	CCMARTLG	Notice of Filing of Correction to Affd of Dr James Merikangas MD	Thomas F. Neville
6/14/2006	MOTN	CCMARTLG	State's Motion for the Production of Documents and for Ordr Waiving the Atty-Client Privilege	Thomas F. Neville
	NOTH	CCMARTLG	Notice Of Hearing State's Motn to Dismiss and Motn for Production of Documents (6-20-06 @ 1:30 pm)	Thomas F. Neville
	MOTN	DCELLISJ	Motion To Disqualify	Thomas F. Neville
	AFFD	DCELLISJ	Affidavit Of Mark J. Ackley In s upport of Motion to Disqualify	Thomas F. Neville
	MEMO	DCELLISJ	Memorandum In support of Motion to Disqaulify	Thomas F. Neville
	NOTC	DCELLISJ	Notice Of Hearing June 20, 2006 @ 1:30 p.m.	Thomas F. Neville
6/20/2006	HRHD	DCELLISJ	Hearing result for Motion held on 06/20/2006 01:30 PM: Hearing Held State's Motn in Limine to Preclude Depositions Without Court Order State's Motn to Dismiss and Motn for Production of Documents	Thomas F. Neville
6/22/2006	OBJT	CCSHAPML	State's Objection to the Petitioner's Motion to Disqualify the Court	Thomas F. Neville
	NOTC	CCSHAPML	Notice of Hearing (7/5/06 @ 9:00AM)	Thomas F. Neville
	HRSC	CCSHAPML	Hearing Scheduled (Hearing Scheduled 07/05/2006 09:00 AM)	Thomas F. Neville
6/27/2006	AMEN	CCWOODCL	Amended State's Motion For The Production Of Documents and For Order Waiving Attorney Client Privilege	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/27/2006	NOTH	CCWOODCL	Notice Of Hearing (07/05/06 @ 9 am)	Thomas F. Neville
6/30/2006	MISC	DCANDEML	3rd Addendum to Amended Petition	Thomas F. Neville
	NOTC	DCANDEML	Notice of Hearing (7/5 @9 a.m.)	Thomas F. Neville
7/5/2006	HRHD	DCELLISJ	Hearing result for Hearing Scheduled held on 07/05/2006 09:00 AM: Hearing Held	Thomas F. Neville
	HRSC	DCELLISJ	Hearing Scheduled (Hearing Scheduled 09/27/2006 09:00 AM)	Thomas F. Neville
7/6/2006	ORDR	DCELLISJ	Order Granting Access to Completed jury questionnaires	Thomas F. Neville
7/11/2006	ORDR	DCELLISJ	Order Denying Motion to Disqualify NUNC PRO TUNC	Thomas F. Neville
	ORDR	DCELLISJ	Order Denying the Motion to Suspend post conviction proceedings	Thomas F. Neville
	ORDR	DCELLISJ	Order Denying Petitioner's Motion to Transport for Medical Testing	Thomas F. Neville
	ORDR	DCELLISJ	Order Waiving Attorney-Client Privilege And Granting State's Access To Documents	Thomas F. Neville
7/19/2006	ORDR	DCELLISJ	Order Granting In Part, And Denying in Part, Petitioner's Motion for Issuance of Subpoenas For Depositions and Subpoenas Duces Tecum For Production of Documents	Thomas F. Neville
	MOTN	DCELLISJ	Motion For Permission To Appeal The Denial of Petitioner's Motion to Disqualify	Thomas F. Neville
8/24/2006	AFOS	CCMAXWSL	Affidavit Of Service 8-24-2006	Thomas F. Neville
	AFOS	CCMAXWSL	Affidavit Of Service 8-24-2006	Thomas F. Neville
9/11/2006	MISC	DCANDEML	Partial Agreement on Discovery	Thomas F. Neville
9/26/2006	HRVC	DCELLISJ	Hearing result for Motion to Compel held on 09/27/2006 09:00 AM: Hearing Vacated	Thomas F. Neville
12/6/2006	MOTN	DCELLISJ	Ex Parte Motion for Expert Access to Petitioner	Thomas F. Neville
	AFFD	DCELLISJ	Affidavit Of Paula M. Swensen in Support of Ex Parte Motion For Expert Access to Petitioner	Thomas F. Neville
12/21/2006	HRSC	DCELLISJ	Hearing Scheduled (Post Conviction Relief 01/04/2007 09:00 AM)	Thomas F. Neville
12/29/2006	MISC	CCHEATJL	Supplemental Memorandum In Support Of Motion For Discovery	Thomas F. Neville
1/8/2007	MISC	DCELLISJ	Fourth Addendum to Amended Petition for Post-Conviction Relief	Thomas F. Neville
	NOTC	DCELLISJ	Notice Of Filing of Index of Exhibits to Amended Petition For Post Conviction Relief	Thomas F. Neville
	NOTC	DCELLISJ	Notice Of Filing of Table of Contents to Amended Petition for Post Conviction Relief	Thomas F. Neville
1/10/2007	CONT	DCELLISJ	Hearing result for Post Conviction Relief held on 01/10/2007 01:30 PM: Continued	Thomas F. Neville
I/11/2007	CONT	DCELLISJ	Post conviction hearing, cont'd to 01/12/2007 @ 9:30 a.m.	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
1/11/2007	ORDR	DCELLISJ	Order To Vacate NUNC PRO TUNC hearing November 9, 2006 hearing	Thomas F. Neville
1/12/2007	CONT	DCELLISJ	Post Conviction hearing	Thomas F. Neville
2/2/2007	MOTN	CCMARTLG	Renewed Motion for Order to Conduct Medical Testing and Order for Transport	Thomas F. Neville
	MOTN	CCMARTLG	Motion for Juror Contact	Thomas F. Neville
	NOTH	CCMARTLG	Notice Of Hearing (2-16-07 @ 9 am)	Thomas F. Neville
	HRSC	CCMARTLG	Hearing Scheduled (Motion 02/16/2007 09:00 AM) Renewed Motn for Order to Conduct Medical Testing and Order for Transport and Motn for Juror Contact	Thomas F. Neville
2/9/2007	MOTN	CCMARTLG	State's Motion to Clarify Discovery Order And/Or to Modify Discovery Order	Thomas F. Neville
	NOTH	CCMARTLG	Notice Of Hearing Motn to Clarify Discovery (2-16-07 @ 9 am)	Thomas F. Neville
2/12/2007	MEMO	MCBIEHKJ	Memorandum in Support of Renewed Motion	Thomas F. Neville
2/13/2007	NOTC	DCELLISJ	Withdrawal of Notice of Hearing on Motion for Juror Contact	Thomas F. Neville
2/16/2007	MISC	DCELLISJ	Response to State's Motion To Clarify Discovery Order and/Or To Modify Discovery Order	Thomas F. Neville
	ORDR	DCELLISJ	Order Regarding Discovery	Thomas F. Neville
	ORDR	DCELLISJ	Order To transport petitioner no later than Feb. 26, 2007 For Radiological and serological Testing	Thomas F. Neville
	HRHD	DCELLISJ	Hearing result for Motion held on 02/16/2007 09:00 AM: Hearing Held Renewed Motn for Order to Conduct Medical Testing and Order for Transport and Motn for Juror Contact; Motn to Clarify Discovery and/or Modify Discovery Order	Thomas F. Neville
2/20/2007	NOTC	DCELLISJ	Notice Of Filing of Curriculum Vitae For James R. Merikangas, M.D.	Thomas F. Neville
3/16/2007	RSPS	CCMARTLG	Discovery Response to Court	Thomas F. Neville
5/14/2007	NOTC	DCANDEML	Notice of Hearing (6/15 @ 2:30)	Thomas F. Neville
	HRSC	DCANDEML	Hearing Scheduled (Hearing Scheduled 06/15/2007 02:30 PM)	Thomas F. Neville
6/1/2007	MOTN	CCMARTLG	Motion For Juror Contact	Thomas F. Neville
	MEMO	CCMARTLG	Memorandum In Support Of Motn For Juror Contact	Thomas F. Neville
	MOTN	CCMARTLG	Sealed Supplemental Motion For Discovery Document sealed	Thomas F. Neville
6/5/2007	NOFG	CCTHIEBJ	Notice Of Filing of Attachments To Sealed Supplemental Motion For Discovery Document sealed	Thomas F. Neville
6/11/2007	MISC	DCELLISJ	Sealed Notice of Filing of Audio Citations to Interview of Norma Jean Oliver Document sealed	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
6/15/2007	CONH	DCELLISJ	Hearing result for Hearing Scheduled held on 06/15/2007 02:30 PM: Conference Held	Thomas F. Neville
7/9/2007	OBJT	CCDWONCP	State's Objection to Petitioner's Motion for Unrestricted Access to Jurors	Thomas F. Neville
8/8/2007	ORDR	DCELLISJ	Agreed Protective Order	Thomas F. Neville
8/23/2007	MOTN	CCTHIEBJ	Motion For Permission To Appeal	Thomas F. Neville
	NOHG	CCTHIEBJ	Notice Of Hearing	Thomas F. Neville
8/27/2007	RSPS	CCBLACJE	State's Response to Request for Admissions	Thomas F. Neville
9/6/2007	MOTN	DCELLISJ	Motion For Expert Access To Petitioner	Thomas F. Neville
9/12/2007	ORDR	DCANDEML	Order to Provide Transcript of Hearing Held in Ada County Case No. HCR18591	Thomas F. Neville
	ORDR	DCANDEML	Order To Conduct Medical Testing	Thomas F. Neville
9/13/2007	ORDR	DCANDEML	Court's Order Denying Petitioner's Motion For Juror Contact	Thomas F. Neville
	ORDR	DCANDEML	Order to Release Records of Norma Jean Oliver	Thomas F. Neville
	ORDR	DCANDEML	(6) Order to Release Medical & Physical/Psychiatric Records of Norma Jean Oliver	Thomas F. Neville
9/17/2007	ORDR	DCANDEML	Order Granting in Part and Denying in Part Petitioner's Supplemental Motion for Discovery	Thomas F. Neville
9/28/2007	TRAN	CCTHIEBJ	Transcript Filed	Thomas F. Neville
10/1/2007	MOTN	CCTEELAL	Motion for Fragile X Blood Test	Thomas F. Neville
10/3/2007	ORDR	CCTHIEBJ	Order To Conduct Fragile-X Blood Test	Thomas F. Neville
10/5/2007	PETN	DCELLISJ	Final Amended Petition for Post Conviction Relief	Thomas F. Neville
10/12/2007	NOTC	DCANDEML	Notice of Filing of Table of Contents	Thomas F. Neville
	NOTC	DCANDEML	Notice of Filing of Index of Exhibits	Thomas F. Neville
	NOTC	DCANDEML	Notice of Filing of Verifictation Page	Thomas F. Neville
10/19/2007	NOTC	DCELLISJ	Notice of Filing of Exhibit 97 to the final amended petition for post-conviction relief	Thomas F. Neville
10/29/2007	MOTN	CCSTROMJ	Motion for Additional Time to Make State's Response to Final Amended Petition for Post Conviction Relief	Thomas F. Neville
11/16/2007	NOTC	CCTHIEBJ	Notice Of Filing Of Exhibit 17 To The Final Amended Petition For Post-Conviction Relief	Thomas F. Neville
12/21/2007	MOTN	CCTHIEBJ	State's Motion To Dismiss	Thomas F. Neville
	RSPN	CCTHIEBJ	State's Response To Final Amended Petition For Post Conviction Relief	Thomas F. Neville
1/18/2008	ORDR	DCELLISJ	Order Denying Petitioner's Motion for Permissive Appeal	Thomas F. Neville
	HRSC	DCELLISJ	Hearing Scheduled (Status 02/08/2008 03:00 PM)	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
1/18/2008	HRSC	DCELLISJ	Hearing Scheduled (Hearing Scheduled 05/01/2008 09:00 AM) 1 1/2 days on State's Motion for Summary Dismissal	Thomas F. Neville
	RSPN	CCTHIEBJ	Addendum To State's Response To Final Amended Petition For Post Conviction Relief: State's Response To Petitioner's Claim C	Thomas F. Neville
1/25/2008	MOTN	DCELLISJ	Motion for Issuance of Subpoena Duces Tecum	Thomas F. Neville
	HRSC	DCELLISJ	Notice of Hearing Feb, 8, 2008 @ 3:00 p.m.	Thomas F. Neville
2/8/2008	ORDR	DCELLISJ	Order on Discovery Disclosed January 18, 2008 regarding Norma Jean Oliver and April Sebastian	Thomas F. Neville
	HRHD	DCELLISJ	Hearing result for Status held on 02/08/2008 03:00 PM: Hearing Held	Thomas F. Neville
	OBJC	CCTHIEBJ	State's Objection To The Petitioner's Motion For Issuance Of Subpoena Duces Tecum	Thomas F. Neville
2/15/2008	ORDR	DCTYLENI	Order Restricting Contact with Norma Jean Oliver	Thomas F. Neville
	ORDR	DCTYLENI	Order Denying Petition's Moiton for Issuance of Subpoena Duces Tecum	Thomas F. Neville
3/3/2008	RESP	DCELLISJ	Response to The State's Motion to Dismiss (Filed under Seal) Document sealed	Thomas F. Neville
3/5/2008	APDC	DCELLISJ	Appeal Filed In District Court	Thomas F. Neville
	CAAP	DCELLISJ	Case Appealed:	Thomas F. Neville
3/6/2008	MOTN	DCHOPPKK	Motion for Release of Documents Referenced in Addendum to PSI of April Sebastian in Ada County Case No. H0400228 (Capital Case)	Thomas F. Neville
	MOTN	DCHOPPKK	Motion for Order for Release of Payette County Juvenile Records of Norma Jean Oliver (Capital Case)	Thomas F. Neville
3/31/2008	MOTN	DCHOPPKK	Motion To Stay Post-Conviction Proceedings and to Vacate Hearing on the State's Motion to Dismiss	Thomas F. Neville
4/4/2008	HRSC	DCELLISJ	Hearing Scheduled (Hearing Scheduled 04/07/2008 03:30 PM) Notice of Hearing	Thomas F. Neville
4/7/2008	CONT	DCELLISJ	Hearing result for Hearing Scheduled held on 04/07/2008 03:30 PM: Continued	Thomas F. Neville
	ORDR	DCELLISJ	Order For Release of Payette County Juvenile Records of Norma Jean Oliver	Thomas F. Neville
4/16/2008	MOTN	DCELLISJ	State's Motion for the production of The Petitioner's Brain MRI SCAN	Thomas F. Neville
	ORDR	DCELLISJ	Order For Delivery of Medical Records to the Ada County Prosecuting Atty's office pursuant to the Health Insurance Portability Accounting Act and I.C. §19-3004; ICR 17	Thomas F. Neville

Erick Virgil Hall, Plaintiff vs State Of Idaho, Defendant

Date	Code	User		Judge
5/1/2008	DCHH	DCELLISJ	Hearing result for Hearing Scheduled held on 05/01/2008 09:00 AM: District Court Hearing Hel Court Reporter: Sue Wolf Number of Transcript Pages for this hearing estimated: Less than 300 pages	Thomas F. Neville
5/6/2008	PROS	PRPERRRA	Prosecutor assigned ROGER BOURNE	Thomas F. Neville
7/28/2008	MOTN	CCAMESLC	Motion to File Addendum to Amended Petition for Post Conviction RElief	Thomas F. Neville
8/19/2008	OBJE	MCBIEHKJ	States Objection to Motion to File Addendum to Final Amended Petition for Post Conviction Relief	Thomas F. Neville

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. H0300518 PETITION FOR POST-CONVICTION RELIEF (Capital Case) ORIGINAL

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the State Appellate Public Defender (SAPD), and petitions this Honorable Court for post-conviction relief from the conviction and sentences imposed by this Court in the Fourth Judicial District, in *State v. Hall*, Ada County Case No. H0300518, on January 18, 2005. This Court has jurisdiction over the action pursuant to I.C. §19-2719; §§19-4901 *et seq.*; I.C.R., Rules 35 and 57; and Article I, Sections 1 and 5 of the Constitution of the State of Idaho. Petitioner relies on Article I, §§ 1, 5, 6, 7, 8, 13, 17 and 18 of the Constitution of the State of Idaho, and the Fourth,

Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as International Human Rights Law in support of this Petition for Post-Conviction Relief (herein "Petition").

I. BACKGROUND (I.C.R. 57(a)(1) through (a)(6))

1. Petitioner is in the custody of the State of Idaho Department of Correction, detained at the Idaho Maximum Security Institution (IMSI) near Boise, Idaho.
2. Judgment and sentence were pronounced by Honorable Thomas F. Neville, District Judge of the Fourth Judicial District of the State of Idaho, in Ada County, Boise, Idaho.
3. Petitioner stands convicted in Ada County Case No. H0300518 of the crimes of:

   Count I, Murder in the First Degree

   Count II, Rape

   Count III, Kidnapping in the First Degree

4. The Court imposed sentences as follows on the 18th day of January, 2005:

   Count I, for Murder: Death

   Count II, for Rape: Life in Prison without possibility of parole

   Count III, for Kidnapping: Life in Prison without possibility of parole

   The sentences for Counts II and III are to run consecutively.

5. Petitioner pled NOT GUILTY and a jury returned verdicts of guilty to the crimes charged.
6. Other than post-trial motions and any prematurely filed NOTICE OF APPEAL, which cannot be litigated under Idaho law until these post-conviction matters are concluded, this is Petitioner's first attempt in any court to obtain relief from the convictions and sentences herein challenged.

II. ILLEGAL RESTRAINT OF LIBERTY

Petitioner is a person restrained of his liberty in that he is a prisoner of the State of Idaho, under the custody of the Idaho State Board of Corrections, held on death row at the Idaho Maximum Security Institution in Boise, Idaho. This restraint is pursuant to the following conviction and sentence imposed on January 18, 2005 by this Court presiding in the Fourth Judicial District, in *State v. Hall*, Ada County Case No. H0300518: Murder in the First Degree, Kidnapping in the First Degree, and Rape. This restraint is illegal in that the convictions and sentences were obtained in violation of the constitutions of the United States and of the State of Idaho and in violation of court rules, statutes and other law as set forth below.

III. LACK OF SPECIFICITY – NEED TO AMEND

This Petition is filed according to the time constraints of I.C. § 19-2719, giving Petitioner only forty-two (42) days within which to file an initial petition for post-conviction relief. Due to these time constraints, it is impossible for Petitioner to file a petition which complies with I.C. §§ 19-4901, *et seq.*, § 19-2719 and ICR 57, because of the following factors, among others:

1. As required by ICR 44.2 and I.C. 19-870(1)(c), the Court appointed Petitioner's present counsel to represent him in post-conviction proceedings on February 17, 2005;[1]
2. Present counsel for Petitioner have limited knowledge of and had no participation in the criminal case leading to the conviction and sentences herein challenged; and
3. Present counsels have not yet received a copy of the reporter's transcript or the clerk's record from the criminal proceedings and have not had a meaningful

[1] Present counsel was previously appointed to represent Petitioner in his direct appeal on January 25, 2005.

opportunity to conduct an independent investigation and to engage in discovery as of this time.

A claim of ineffective assistance of counsel requires review of the trial transcript and the entire record to determine the nature, frequency and effect of counsel's errors, *Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001), in addition to a thorough investigation for claims outside the record. *See Douglas v. California,* 372 U.S. 353, 358 (1963) (recognizing that even a thorough investigation of the record may not reveal all claims since often "the record is unclear or the errors are hidden" and noting that reliance solely on the record would likely render post-conviction proceedings "a meaningless ritual.") This investigation must be both diligent and exhaustive, aimed at including all possible grounds for relief since the failure to raise all possible claims may result in a procedural bar. *See* I.C. § 19-2719 (3), (5); *Pizzuto v. State,* 127 Idaho 469; 903 P.2d 58 (1995); *State v. Rhoades,* 120 Idaho 795, 820 P.2d 665 (1991). Further, the investigation can neither rely solely on the assistance and investigation of trial counsel, *see Hoffman, supra* (recognizing the inability or difficulty of trial counsel's objective examination of their own performance); I.C.R. 44.2 (requiring the appointment of at least one attorney other than trial counsel to represent the defendant in post-conviction), nor upon the discovery provided by the prosecutor or law enforcement during the underlying criminal proceedings. *See McCleskey v. Zant,* 499 U.S. 467, 498 (1991).

Petitioner has not had sufficient time to conduct this independent investigation, yet alone adequate time to review the volumes of material that trial counsel had in their possession during their prior representation. In fact, at this time Petitioner has not even received all documents from trial counsel due to their recent refusal to supply Petitioner with all their files absent a court order. Nevertheless, Petitioner has acted with diligence in preparing this petition. Petitioner has

already taken the following steps: attempted several times to obtain all of trial counsels' files, obtained the files of the mitigation specialist, requested the files of the defense investigator, and conducted cursory interviews with Petitioner, the mitigation specialist, and trial counsel. Among the steps remaining to be taken include the following: obtain and review trial counsels' files, obtain and review the defense investigator's files, obtain and review the reporter's transcript and clerk's record, identify and request relevant records, conduct comprehensive interviews with all members of the defense team and potential witnesses, determine which experts would be appropriate for case development, and otherwise re-investigate the crime and surrounding events. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (herein "ABA Guidelines"), Guideline 10.15.1 ("Duties Of Post-Conviction Counsel").[2]

Accordingly, Petitioner will seek this Court's leave to amend his Petition pursuant to I.C. § 19-4906(a) and ICR 15 from time to time as development of his case in post-conviction progresses. Nevertheless, in support of his petition for post-conviction relief from the conviction and sentence entered against him, Petitioner is able to show the Court as follows:

IV. GROUNDS FOR RELIEF

The convictions and sentences entered against Petitioner were obtained in violation of laws of the United States and of Idaho, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 1, 5, 6, 7, 8 13, 17, and 18, of the

[2] The Commentary to this Guideline provides in part: "Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses."

Constitution of the State of Idaho, provisions of the Idaho Code and the Idaho Criminal Rules as well as international law.

Petitioner alleges that all claims of ineffective assistance of counsel herein satisfy both prongs of the *Strickland* analysis, specifically, that the claims show 1) a deficiency in trial counsel's performance, and (2) that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In addition, Petitioner alleges that he has demonstrated prosecutorial misconduct and the necessary level of prejudice for this Court to grant him relief. Finally, Petitioner alleges that even if the claims do not meet the governing level of prejudice on their own, that when cumulatively considered, the accumulation of error creates prejudice entitling Petitioner to relief. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

A. PROSECUTORIAL MISCONDUCT AT PRETRIAL, TRIAL AND SENTENCING PROCEEDINGS.

1. The Prosecution Committed Misconduct By Failing To Timely Disclose Favorable Evidence.

Suppression of evidence favorable to an accused by the prosecution violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland,* 373 U.S. 83 (1963). Favorable evidence includes not only that evidence tending to exculpate the accused, but also any evidence adversely affecting the credibility of the government's witnesses, e.g., evidence that could be used for impeachment. *Giglio v. United States*, 405 U.S. 150 (1972). The prosecution must actively search out material in its files and in the files of related agencies reasonably expected to have possession of evidence favorable to an accused. *Kyles v. Whitley*, 514 U.S. 419 (1995).

Even this early in his investigation, Petitioner is aware of at least one item of evidence withheld from him that would have been favorable during the guilt and punishment phases of his

trial. Specifically, Petitioner claims that the prosecution and/or its agents withheld medical records of the prior statutory rape victim, Norma Jean Oliver. These records were withheld until conclusion of the case. If the records had been disclosed in a timely manner as requested, then Petitioner could have rebutted the testimony of the victim that Petitioner had committed a prior forcible rape. The records would have shown that the victim did not have any injuries associated with rape, and as such, the amended charge of statutory non-forcible rape was more consistent with the facts of the prior incident.

2. The Prosecution Committed Misconduct By Making An Improper Closing Argument Regarding The Definition Of Mitigation.

Several times during closing argument, the State argued that Petitioner's mitigation evidence was not mitigating evidence because it did not ***excuse*** his conduct. However, by definition, mitigation is not so narrowly confined; indeed, mitigation cannot constitute an excuse or justification for criminal conduct, if so, then the defendant would not be guilty of the crime. As such, the prosecution's argument precluded the jury from considering mitigation presented at odds with the definition of mitigation. The Idaho Supreme Court has stated,

> We generally note that the concept of mitigation is broad. Mitigating circumstances have been defined as: "Such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." Black's Law Dictionary (5th ed. 1979) at 903.

State v. Osborn, 102 Idaho 405, 415, 631 P.2d 187, 197 (1981). Indeed, mitigation is anything that could justify a sentence less than death, *State v. Creech*, 105 Idaho at 369, 670 P.2d at 470 (1983) or any circumstances that "may be considered as extenuating or reducing the degree of moral culpability." *Osborn,* 102 Idaho at 415, 631 P.2d at 197. Thus, mitigation not only refers to circumstances surrounding the commission of the crime but also circumstances of the

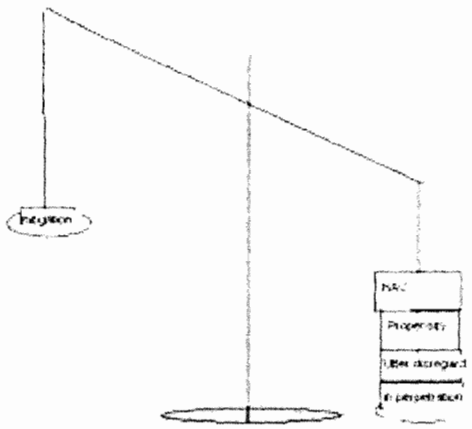
defendant himself including "his background, his age, upbringing and environment or any other matter appropriate to a determination of the degree of culpability." *Id.*

An individual juror must be free to consider a mitigating factor, regardless of whether other members of the jury agree as to its existence. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990) ("each juror [must] be permitted to consider and give effect to mitigating evidence"). It is not enough "simply to allow the defendant to present mitigating evidence to the sentencer," rather there must not be any impediment, through evidentiary rules, jury instructions, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), or ***prosecutorial argument***. *Penry v. Lynaugh*, 492 U.S. 302, 326 (1989). In this case, the prosecutor's closing argument created an impediment to the jury's consideration of mitigating circumstances by limiting the jury's consideration of mitigation to evidence that would excuse criminal conduct and thus impeding consideration of evidence that would have called for a lesser sentence.[3] This misconduct requires this Court to vacate Petitioner's death sentence.

3. The Prosecution Committed Misconduct By Making An Improper Closing Argument Regarding The Manner In Which Mitigation Is Weighed Against The Aggravation.

While arguing their view of mitigation, the State presented a slide that depicted the weighing of aggravating circumstances against mitigating circumstances. The illustration was that of a scale, likened to the scales of justice, with the term "mitigation" on one side weighed against all four aggravating circumstances the State sought to prove to the jury: "HAC," "Propensity," "Utter disregard," and "In perpetration." The illustration resembled the following:

[3] Not only did these improper arguments affect the jury and its verdict, but the Court as well. Specifically, in its post-verdict findings, the Court noted that Petitioner's mitigation evidence did not excuse his crimes, indicating the Court's agreement with the jury regarding their finding that the four aggravating circumstances were not outweighed by the mitigation.



As shown above, the prosecution drew a scale leaning heavily in favor of the four aggravating circumstances weighed aggregately against the mitigation. Drawing upon the scale in its argument, the prosecution asserted that Petitioner deserved the death penalty.

The State's argument and illustration is a grossly simplified and misleading characterization of the weighing process required under I.C. § 19-2515(8)(a)(ii). The statute requires that all of the mitigation presented by the defense be weighed against ***each*** of the statutory aggravators it has found as proven beyond a reasonable doubt. *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989). The scale depicted by the prosecution misstates the requirements under the law and constitutes gross misconduct. This misconduct requires this Court to vacate Petitioner's death sentence.

4. The Prosecution Committed Misconduct By Arguing That The Defense Experts Were Hired Guns.

During their closing argument, the prosecution referred to Petitioner's experts as hired guns, asserting that "they're in the business of supplying defendants with excuses." The prosecution further referred to their testimony as a "show" that cost $100,000, and rhetorically inquired whether they were "hired to convince [the jury] to spare the defendant?" This argument is constitutionally improper and highly prejudicial.

A defendant has a constitutional right to present a defense which includes the right to expert assistance. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the U.S. Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition." *Id.* at 70. A defendant cannot be penalized for exercising his constitutional rights.

A defendant's right to counsel can be violated by a prosecutor's improper examination of a witness or argument which seeks to penalize the defendant for exercising his constitutional right. *State v. Masters*, No. M2003-00305-CCA-R3-CD, 2004 WL 1208872, at *10 (Tenn. Crim. App. Jun. 2, 2004). In *Masters*, the court held that the defendant's rights were not violated during cross-examination of his experts when the prosecutor sought to attack "the reliability and impartiality of the witnesses because of their attitudes toward capital punishment and the bias of the information on which their opinions were, at least in some part, based." *Id.* However, when the prosecution goes beyond attacking the reliability and impartiality of a witness, the risk of depriving the defendant of a fair trial increases significantly. One such instance is where the state suggests that because the defense experts were paid hefty fees, their testimony would weigh heavily in favor of the defense. *State v. Smith*, 167 N.J. 158, 185, 770 A.2d 255, 272 (N.J. 2001); *see also State v. Schneider,* 402 N.W.2d 779, 788 (Minn.1987) ("Experts are not the paid harlots of either side in a criminal case and should not be portrayed in such a light.").

Petitioner asserts that the prosecutor's argument in his case went beyond attacking the reliability and impartiality of his experts, and thus deprived him of his right to a fair trial and his right to present a defense in mitigation of punishment. This misconduct requires this Court to vacate Petitioner's death sentence.

5. The Prosecution Committed Misconduct By Making An Argument Inconsistent with Evidence Outside The Record.

The prosecution had the opportunity to rebut the testimony of Petitioner's defense experts during the penalty phase of the trial, yet they chose not to do so. Indeed, the prosecution had their own professional witness, Dr. Estess, who they no doubt had to compensate to review Petitioner's experts' opinions as well as their testimony, yet the prosecution did not call him as a witness, presumably because he could not rebut their testimony.

Petitioner asserts that it is improper for a prosecutor to seek to undermine Petitioner's experts when aware that their own expert concurs in their opinions. After review of the transcripts and record in this case, as well as a full opportunity to conduct discovery, Petitioner anticipates presenting additional evidence in support of this claim.

6. The Prosecution Committed Misconduct In Arguing For Imposition Of The Death Penalty To Deter Future Crimes.

During closing arguments, the prosecutor suggested that the death penalty should be imposed to deter future crimes. This argument is improper because it called for the jury to base its penalty verdict on matters wholly irrelevant to their consideration of the crime and the defendant's character and record. Deterrence is a matter solely for ***legislative*** consideration; it is improper for a jury in a capital case to consider alleged deterrent or non-deterrent effects of the death penalty in deciding whether it should be imposed. *See People v. Love*, 56 Cal.2d 720, 366 P.2d 33 (Cal. 1961) (holding that it was improper for the prosecution during closing argument to argue that the death penalty was a more effective deterrent than life imprisonment). Thus, courts uniformly condemn such prosecution appeals to the jury to render their verdicts for the greater social good. The clear purpose of these arguments is an attempt to dissuade the jury from granting mercy to the defendant. *See Wilson v. Kemp*, 777 F.2d 621, 624 (11th Cir. 1985).

However, the requirement that the jury consider mitigating circumstances demonstrates that mercy certainly plays a part in capital sentencing. *Id.* Thus, the prosecutor's argument regarding deterrent effects and society's greater good swayed the focus of the jury away from the consideration of mitigating evidence in favor of evidence irrelevant to its consideration. This misconduct requires this Court to vacate Petitioner's death sentence.

7. The Prosecution Committed Misconduct By Presenting Evidence Regarding Potential Conditions Of A Life Sentence And By Arguing That A Life Sentence Would Be Too Lenient And Otherwise Speculating As To What Might Happen To Petitioner If A Death Sentence Were Withheld.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

B. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO CONDUCT ADEQUATE INVESTIGATION.

1. Trial Counsel Failed To Retain Necessary Defense Experts.

i. Forensic Pathologist.

Trial counsel failed to hire a forensic pathologist or other expert to review the autopsy results and make an independent determination of cause of death or injuries inflicted upon the victim prior to her death. Trial counsel should have obtained independent consultation in each of these areas to truly subject the prosecution's case to the level of adversarial testing demanded in capital cases at both the guilt and penalty phases at trial.

Without sufficient time for an adequate investigation by Petitioner's counsel, it is impossible to determine the actual discrepancies and if others existed that should have been investigated, however, Petitioner asserts he was prejudiced by the mere fact that trial counsel failed to fulfill its duty and effectively allowed the State to present an untested case to the jury at trial and sentencing.

ii. Crime Scene Expert.

Petitioner makes this claim without having reviewed the trial transcript, record or defense files in this case. Petitioner anticipates conducting extensive investigation into this area and reserves the right to withdraw this claim if the evidence does not lend support.

iii. Medical Expert.

Petitioner makes this claim without having reviewed the trial transcript, record or defense files in this case. Petitioner anticipates conducting extensive investigation into this area and reserves the right to withdraw this claim if the evidence does not lend support.

iv. Violence In Penal Institutions Expert.

Petitioner makes this claim without having reviewed the trial transcript, record or defense files in this case. Petitioner anticipates conducting extensive investigation into this area and reserves the right to withdraw this claim if the evidence does not lend support.

v. Penal Institution Management Expert.

Petitioner makes this claim without having reviewed the trial transcript, record or defense files in this case. Petitioner anticipates conducting extensive investigation into this area and reserves the right to withdraw this claim if the evidence does not lend support.

2. Trial Counsel Failed To Adequately Investigate Circumstances Surrounding Petitioner's Prior Conviction For Statutory Rape.

Petitioner was previously convicted of statutory rape. At the murder trial, the prosecution presented the testimony of the victim, Norma Jean Oliver, as well as the testimony of the prior prosecuting attorney on the case, to show that the rape was violent and to show that amendment of the forcible rape charge to statutory rape did not indicate the level of force involved.

Trial counsel was ineffective for failing to obtain all the records of statutory rape case including the medical records which Petitioner believes would have demonstrated at most that

the rape was a non-forcible statutory rape. Trial counsel's failure to conduct an adequate investigation falls below objectively reasonable standard for effectiveness. But for trial counsel's ineffectiveness, Petitioner asserts that there is a reasonable probability that outcome of the trial and the sentencing would have been different.

3. Trial Counsel Failed To Adequately Investigate Petitioner's Development During Adolescence And Adulthood.

During sentencing proceedings, the defense offered testimony from family members and two experts that described Petitioner's horrific childhood. However, trial counsel failed to adequately investigate Petitioner's life in adolescence and adulthood. In their closing argument, the prosecution argued this very fact to the jury. Thus, it was difficult for the jury to draw a connection between Petitioner's childhood and adult behavior and the jury was left with the impression that there were no mitigating circumstances in Petitioner's adult life.

Had trial counsel adequately investigated and presented mitigating circumstances of Petitioner's adolescence and adulthood including mitigating evidence near the time of the crime, it is reasonably probable that the jury would have found that the mitigation outweighed the aggravation and sentenced Petitioner to a life sentence.

C. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL FOR THEIR FAILURE TO EXPLAIN MITIGATION TO THE JURY DURING CLOSING ARGUMENTS.

Not only must trial counsel investigate and present mitigation, *see e.g., Williams* v. *Taylor*, 529 U.S. 362 (2000); *Wiggins* v. *Smith*, 539 U.S. 510 (2003), but counsel must also explain the meaning and purpose of mitigating evidence. *Pizzuto v. Arave*, 385 P.3d 1247, 1252 (2004) (citing *Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir. 2001) ("To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage

in sufficient preparation to be able to present and explain the significance of all the available [mitigating] evidence."); *see also Williams* v. *Taylor*, 529 U.S. at 399.

During the penalty phase, defense counsel offered the testimony of several mitigation witnesses including family members who testified as to the childhood and character of Petitioner. Dr. Mark Cunningham and Dr. Roderick Pettis testified regarding mitigation, including facts of Petitioner's upbringing such as incest, drug abuse, physical and verbal abuse, and neglect. Trial counsel however failed to explain the purpose of mitigation and their testimony to the jury, and instead allowed the prosecution to mislead the jury regarding the definition and purpose of mitigation by failing to object to the prosecution's closing argument mischaracterizing the definition of mitigation. *See supra,* Claim IV. A. b.

Petitioner asserts that but for trial counsel's ineffectiveness, there is a reasonable probability that the jury would have considered the mitigation, appropriately weighed it against the aggravating circumstances, and imposed a life sentence.

1. Failure To Rehabilitate The Credibility Of Its Own Expert Witnesses During Closing Argument.

During closing arguments, the State attempted to discredit the defense's expert witnesses, Dr.'s Cunningham and Pettis, by stating that "they are in the business of supplying defendants with excuses." The State questioned whether the witnesses were neutral or hired to convince the jury to spare the defendant. Not only did trial counsel fail to object, but counsel failed to address these comments in their closing argument. Trial counsel's duty to explain mitigation to the jury must encompass a duty to bolster the source of the mitigating evidence when it is attacked. Trial counsel allowed the jury to conclude that the defense experts' testimony was bought, leaving little, if any, room for reliability. Petitioner was deprived of his right to present mitigation and

have it considered by the jury because of trial counsels' ineffective assistance. Petitioner's sentence should thus be vacated.

D. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE JURY SELECTION PROCESS.

Petitioner has not been afforded the opportunity to review the jury selection proceedings in this case due to a lack of access to the trial transcripts which have not yet been prepared. After further investigation, Petitioner shall expound upon this claim, or reserve the right to withdraw the claim if supporting evidence is not discovered upon further investigation.

1. Trial Counsel Rendered Ineffective Assistance By Failure To Strike For Cause Or Utilize A Preemptory Strike Individual Jurors.

Petitioner has knowledge that at least one juror should have been stricken from the jury, the wife of Timothy McNeese, Deputy Attorney General for the Idaho Department of Corrections. Ms. McNeese ultimately served as the foreperson. It is hardly reasonable to assume that the wife of an advocate for the State in carrying out death sentences would not be affected by her husband's employment when determining whether to impose the death sentence. Further, Petitioner served a 10-year term in the IDOC during the period that Mr. McNeese served as the Deputy Attorney General. It is likely that Mr. McNeese was familiar with Erick Hall and there is a reasonable probability that he shared discussions about inmates, possibly including Mr. Hall, as well as information about conditions of confinement and other matters that a juror might consider, appropriately or not, during the sentencing process with his wife. As stated, Petitioner does not have trial transcripts, the record or files in this case and thus has not had the opportunity to review them.

E. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY RAISE LEGAL CHALLENGES.

1. Trial Counsel Rendered Ineffective Assistance By Failing To Object To The Prosecutor's Closing Argument.

As discussed *supra* in Claim IV. A, subsections b through g, hereby incorporated by reference, in closing argument the prosecution mischaracterized the definition of mitigation evidence and the manner in which it is weighed against evidence in aggravation. The prosecution also improperly 1) commented on the role of Petitioner's experts, 2) argued deterrence as a justification for the death penalty, 3) argued inconsistently with the opinion of their own expert, and 4) speculated on what might happen if a death sentence were not imposed. Trial counsel were ineffective for allowing each these arguments to be presented to the jury without objection. But for trial counsels' failure to object and request a mistrial, and in the alternative, request an admonishment and corrective instruction by the Court, there is a reasonable probability that the result of the proceedings would have been different.

2. Trial Counsel Rendered Ineffective Assistance By Failing To Adequately Challenge The Introduction Of Statements Made By Petitioner To Law Enforcement.

Petitioner has not had the opportunity to review the interrogations, reports, pleadings, and transcripts relevant to this claim and reserves the right to either expound or withdraw this claim after further investigation.

3. Trial Counsel Rendered Ineffective Assistance By Failing To Move For A Change Of Venue.

Trial Counsel failed to move for a change of venue and/or renew a motion for change in venue during voir dire despite the extensive media coverage and pretrial publicity regarding this case and a separate rape/murder case yet to proceed to trial. The sheer volume of publicity in this case rendered it impossible in which to find an impartial jury composed of Mr. Hall's peers.

From the media's and the public's perspective, this was a high-profile case involving a young woman from out-of-town, abducted along the Boise Greenbelt, a highly traveled recreational area in Boise.

Trial counsel should have thoroughly litigated this issue. It is the defendant's burden to show "a reasonable likelihood that prejudicial news coverage prevented a fair trial in violation of the Sixth Amendment to the United States Constitution." *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956, 967 (2003). Thus, it was up to trial counsel to establish that in the totality of the circumstances, juror exposure to pretrial publicity would result in a trial that was fundamentally unfair to the Defendant. *Id.* Trial counsel should have presented the Court information in support of a motion for change of venue including, but not limited to, the nature and content of pretrial publicity, affidavits indicating the level of community prejudice, and testimony by prospective jurors. *Id.*

Because no motion for a change of venue was filed, this Court was never given the opportunity to review the significant amount of damaging media coverage in the Boise community regarding this case that spanned several years. After a review of the transcripts and record, Petitioner anticipates expanding this claim to include other evidence of the ineffectiveness of counsel in failing to move for a change of venue.

4. Trial Counsel Rendered Ineffective Assistance By Failing To Request A Special Jury Instruction That Would Require The Jury To Provide Written Findings Delineating The Mitigating Circumstances That Were Found.

Prior to the amendment to I.C. § 19-2515, a judge, not a jury, was required to make written findings setting forth any statutory aggravating circumstance found and set forth in writing any mitigating factors considered. I.C. § 19-2515(f) (Michie 2000). The failure to make such written findings constituted reversible error. *State v. Osborn*, 102 Idaho 405, 415-16, 631

P.2d 187, 197-98 (1981); *Creech v. Arave*, 928 F.2d 1481, 1489-90 (9th Cir. 1991), reversed in part on other grounds by *Arave v. Creech*, 507 U.S. 463 (1993).

The written findings requirement serves two purposes: 1) it helps to ensure that the imposition of the sentence of death is reasoned and objective as constitutionally required, and 2) it protects a capital defendant's right to meaningful appellate review. *See Osborn,* at 414-15; 631 P.2d at 196-97. Without the findings, the reviewing court cannot determine whether the fact-finder overlooked or ignored any mitigation that was presented, whether the evidence supports the aggravating factors found, and whether the fact-finder properly weighed all factors. *Id.* at 415, 631 P.2d at 197; *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (1993).

Pursuant to the current version of the statute, if a defendant waives the right to a jury at his sentencing proceeding, the district court shall

> (i) [m]ake written findings setting forth any statutory aggravating circumstance found beyond a reasonable doubt;
> (ii) [s]et forth in writing any mitigating circumstances considered; and
> (iii) [u]pon weighing all mitigating circumstances against each statutory aggravating circumstance separately, determine whether mitigating circumstances are found to be sufficiently compelling that the death penalty would be unjust and detail in writing its reasons for so finding."

I.C. § 19-2515(8)(b). In contrast, when a jury is not waived, the jury is only required to indicate on special verdict forms whether a statutory aggravating circumstance has been proven beyond a reasonable doubt, and "whether all mitigating circumstances, when weighed against the aggravating circumstance, are sufficiently compelling that the death penalty would be unjust." I.C. § 19-2515(8)(a).

Because the jury is not required to specify the mitigating circumstances it found, a defendant who chooses to have a jury make the findings of fact at his sentencing proceeding relinquishes his constitutional right to have his sentence meaningfully reviewed by the district

court and by the Idaho Supreme Court on direct appeal and as a part of its mandatory sentencing review under I.C. § 19-2827. Without a complete record, the district court and the Idaho Supreme Court are precluded from conducting a meaningful review which includes a determination whether imposition of the death sentence was reasoned and objective or the result of arbitrariness and passion. *See e.g., Osborn,* at 415, 631 P.2d at 197 ("If the findings of the lower court are not set forth with reasonable exactitude, this court would be forced to make its review on an inadequate record, and could not fulfill the function of 'meaningful appellate review' demanded by the decisions of the United States Supreme Court."); *see also State v. Lankford*, 116 Idaho 860, 877, 781 P.2d 197, 214 (1989) (recognizing the increased potential of arbitrary and inconsistent imposition of the death penalty by juries).

Trial counsel should have requested a special verdict form requiring the jury to delineate the mitigating circumstances it found and the weighing of such mitigation against the individual aggravating circumstances when rendering its sentencing decision. Petitioner has been deprived of the right to have this Court and an appellate court determine whether his sentence was the result of a reasoned and objective analysis. Because of trial counsel's ineffectiveness, Petitioner has lost the necessary predicate for his right to a meaningful review. Petitioner's sentence should thus be vacated and be afforded a new sentencing proceeding where the sentencer is required to provide adequate written findings.

5. Trial Counsel Rendered Ineffective Assistance By Failing To Challenge Idaho's "Heinous, Atrocious Or Cruel" Aggravating Circumstance, And The Respective Instruction To The Jury, As Unconstitutionally Vague And As Not Having Been Meaningfully Narrowed By The Idaho Supreme Court To Comport With The Eighth Amendment.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim. Petitioner does not however assert that especially in

light of the advent of jury sentencing in Idaho, trial counsel has an obligation to reassess prior case law upholding this and other aggravating circumstances, *see also infra,* Claim IV. E, subsections f through g. For instance, in previously upholding the "heinous, atrocious or cruel" aggravating circumstance, the Idaho Supreme Court stated:

> Lankford asserts that the aggravating factor that "their murder was especially heinous, atrocious or cruel, manifesting exceptional depravity," is unconstitutional under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In *Maynard,* the U.S. Supreme Court held that the aggravating circumstance of an Oklahoma death penalty statute which referred to especially heinous, atrocious or cruel murders was unconstitutionally vague pursuant to the Eighth Amendment to the United States Constitution. The Court reasoned that these aggravating factors failed to adequately inform the sentencer of what must be found in order to impose the death penalty and thereby left the sentencer with the ability to impose the death penalty in an arbitrary and capricious manner.
>
> **There is, however, an important distinction between the Oklahoma and Idaho aggravating circumstance statutes. The distinction is that Oklahoma has jury sentencing while Idaho adheres to judicial sentencing in capital murder cases. These aggravating circumstances are terms of art that are commonly understood among the members of the judiciary. As a result, the potential for inconsistent application that exists as a result of jury sentencing is eliminated where the judge sentences.**

State v. Lankford, 116 Idaho 860, 877, 781 P.2d 197, 214 (1989) (emphasis added). Thus, trial counsel were ineffective in failing to challenge the constitutionality of this aggravating circumstance, not necessarily solely because of the change to jury sentencing, but especially because of such change. *See* ABA Guidelines, Commentary to Guideline, 10.8 ("As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.")

i. Idaho Has Failed To Establish A Valid Limiting Construction.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

i. The Unconstitutional Aggravating Circumstance Requires Re-Sentencing.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

ii. Even If The Aggravating Circumstance Is Valid, The Jury Erred In Finding It In This Case.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

6. Trial Counsel Rendered Ineffective Assistance of Counsel In Failing to Challenge The Aggravating Circumstance, I.C. § 19-2515(9)(f), And The Respective Instruction To The Jury, That The Defendant Exhibited Utter Disregard For Human Life, As Unconstitutional.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim. *See also supra,* Claim IV. E, subsection e, hereby incorporated by reference.

i. Idaho Has Failed To Establish A Valid Limiting Construction.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

ii. The Unconstitutional Aggravating Circumstance Requires Re-Sentencing.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

iii. Even If The Aggravating Circumstance Is Valid, The Jury Erred In Finding It In This Case.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

7. Trial Counsel Rendered Ineffective Assistance of Counsel in Failing to Challenge The Aggravating Circumstance I.C. § 19-2515(h)(8), And The Respective Instruction To The Jury, As Unconstitutionally Broad And Indefinite Until The Idaho Supreme Court Supplies More Direction For Its Application.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim. *See also supra,* Claim IV. E, subsection e, hereby incorporated by reference.

i. Idaho Has Failed To Establish The Appropriate Context For Determining The Existence Of The Aggravating Circumstance.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

ii. The Unconstitutional Aggravating Circumstance Requires Re-Sentencing.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

iii. Even If The Aggravating Circumstance Is Valid, The Jury Erred In Finding It In This Case.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

8. Ineffective Assistance Of Counsel In Failing To Raise International Law Violations.

The convictions and sentences entered against Petitioner were obtained in violation of international law.

V. PRAYERS FOR RELIEF

WHEREFORE, the Petitioner, Erick Virgil Hall, respectfully prays this Honorable Court:

1. To allow civil discovery pursuant to the IRCP and ICR 57(b);

2. For leave to amend the Petition as more information becomes available during the course of these proceedings;

3. For an evidentiary hearing on the merits of the petition;

4. For an order vacating the convictions and sentences imposed against Petitioner;

5. For such other, further relief as, to the Court, seems just and equitable.

DATED this 2nd day March of 2005.

MARK J. ACKLEY
Deputy State Appellate Public Defender

KIMBERLY J. SIMMONS
Deputy State Appellate Public Defender

for
ERIK R. LEHTINEN
Deputy State Appellate Public Defender

VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

Erick Hall, being first duly sworn, deposes and says:

That I am the Petitioner in the above entitled action; that I have read the foregoing PETITION FOR POST-CONVICTION RELIEF, and I know the contents thereof, and that the facts contained therein are true and correct as I verily believe. based upon his review of the record, conversations with Petitioner.

DATED this 25 day of February, 2005.

Erick V. Hall
ERICK VIRGIL HALL
Petitioner

SUBSCRIBED AND SWORN to before me this 25 day of February, 2005.

ALEXIS C. ROUTH NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, ID
My commission expires 2-8-2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 1st day of March, 2005, served a true and correct copy of the forgoing PETITION FOR POST-CONVICTION RELIEF as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	_____ Statehouse Mail _____ U.S. Mail _____ Facsimile __X__ Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	__X__ Statehouse Mail _____ U.S. Mail _____ Facsimile _____ Hand Delivery

Guadalupe Ayala

GUADALUPE AYALA
Administrative Assistant

Filed March 3, 2005 3:34 PM

J. DAVID NAVARRO
CLERK OF THE DISTRICT COURT

By J. Black, Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Erick Virgil Hall Plaintiff,	)	
vs.	)	Case No. SP OT 0500155
State of Idaho Defendant.	)	CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the Petition for Post-Conviction Relief as notice pursuant to Rule 77 (d) I.C.R. in envelopes addressed as follows:

Prosecuting Attorney; Inter-Departmental Mail

J. DAVID NAVARRO
Clerk of the District Court
Ada County, Idaho

Dated: 3 March, 2005 By: J. Black
Deputy Clerk

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, vs. STATE OF IDAHO, Respondent,	**Case No. SPOT0500155D** **STATE'S RESPONSE TO POST CONVICTION RELIEF, STATE'S MOTION TO DISMISS, AND STATE'S OBJECTION TO CIVIL DISCOVERY**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and makes the State's Response to the defendant, Erick Virgil Hall's Petition for Post Conviction Relief, as follows.

The State admits that the petitioner is in the custody of the Idaho State Department of Corrections, pursuant to a judgment and sentenced pronounced by the Honorable Thomas F. Neville, District Judge, in Ada County Case No. H0300518.

The State admits that the defendant has been convicted of the crime of First Degree Murder, Rape, and Kidnapping in the First Degree. The State further admits that the defendant has been sentenced to death for the murder and to consecutive fixed life sentences for the rape and kidnapping. The State admits that the petitioner pled not guilty and that a jury returned verdicts of guilty to the crimes charged.

To the knowledge of the undersigned, this is the defendant's first petition for post conviction relief filed in Case No. H0300518.

The State denies every other allegation upon which the petitioner relies in support of this petition for post conviction relief. The State denies that the petitioner is illegally restrained of his liberty and denies that the defendant's convictions and sentences were obtained in violation of the Constitutions of the United States or the State of Idaho, or in violation of any statute, rule or international treaty.

Hereafter, the State will respond to the allegations in the petition using the numbering system in the original petition.

A. **PROSECUTORIAL MISCONDUCT AT PRETRIAL, TRIAL AND SENTENCING PROCEEDINGS.**

1. **...by Failing to Timely Disclose Favorable Evidence.**

The State denies that it suppressed any evidence favorable to the defendant. The State specifically denies that any medical records of Norma Jean Oliver were favorable to the defendant and denies that the medical records were suppressed or withheld from the defendant. The State denies that the records show anything inconsistent with Ms. Oliver's testimony.

2. **... Misconduct by Making an Improper Closing Argument Regarding the Definition of Mitigation.**

The State denies that there was anything improper about the State's closing argument regarding mitigation or any other topic.

3. ... by Making an Improper Closing Argument Regarding the Manner in Which Mitigation is Weighed Against the Aggravation.

The State denies that there was anything improper about the State's closing argument on the topic of weighing mitigation versus aggravation. The jury was properly instructed.

4. ... by Arguing that the Defense Experts Were Hired Guns.

The State denies that any prosecution reference to the defendant's experts was improper or unfairly prejudicial.

5. ... by Making an Argument Inconsistent with Evidence Outside the Record.

To the extent that the Prosecution understands this claim, the Prosecution denies it as being without a legal or factual basis. Counsel for the petitioner has no knowledge concerning information provided by Dr. Estess to the prosecution. His claim is nothing more than speculation without a factual basis. He cites no legal basis for his claim. His claim should be denied.

6. ...in Arguing for Imposition of the Death Penalty to Deter Future Crimes.

The State denies that there was anything improper about the Prosecution's closing argument relative to deterrence.

7. ... by Arguing that a Life Sentence Would be too Lenient...

The State denies this allegation and moves to dismiss since there is no factual basis set out to support the claim.

B. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO FAILURE TO CONDUCT ADEQUATE INVESTIGATION.

1. Trial Counsel Failed to Retain Necessary Defense Experts.

i. – v. Named Experts.

For each of the experts named under this claim, defense counsel admits that he has not reviewed the trial transcript, or record or defense files in this case. In other words, the petitioner has no idea whether trial counsel hired any of the named experts or not and as such has no evidence to support the claim. At this point, no relief can be granted based upon this claim.

2. Trial Counsel Failed to Adequately Investigate Circumstances Surrounding Petitioner's Prior Conviction for Statutory Rape.

The petitioner claims that trial counsel should have reviewed Norma Jean Oliver's medical records which would have demonstrated that the rape was non-forcible. The petitioner does not point to any part of the medical records to support this conclusion and is apparently unaware that trial counsel represented the defendant in that earlier rape charge. There is no legal basis shown and as such, no relief can be granted based on this claim.

3. Trial Counsel Failed to Adequately Investigate Petitioner's Development During Adolescence and Adulthood.

Despite the defense presentation of testimony from family members and a hundred thousand dollars worth of psychologists and psychiatrists' testimony, the petitioner incredibly argues that there were additional mitigating circumstances from the defendant's adolescence and adulthood, which were not presented. The petitioner gives no hint of what those additional facts might be. The allegation should be dismissed.

C. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL FOR THEIR FAILURE TO EXPLAIN MITIGATION TO THE JURY DURING CLOSING ARGUMENTS.

This is a bald assertion without any claimed factual basis. The State moves to dismiss it.

1. Failing to Rehabilitate the Credibility of its own Expert Witnesses During Closing Argument.

This claim is a bald assertion without legal or factual basis and should be dismissed.

D. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE JURY SELECTION PROCESS.

There is no factual basis to support this claim and it should be dismissed.

1. Trial Counsel Rendered Ineffective Assistance by Failure to Strike for Cause or Utilize a Preemptory Strike Against Individual Jurors.

In a bald assertion of astonishing proportions, the petitioner claims that because the husband of one of the jurors was a deputy attorney general assigned to the Department of Corrections at the same time that Erick Hall was serving a sentence in an Idaho prison, the juror would have been familiar with Erick Hall. This is a glaring example of a violation of counsel's obligation of Candor to the Tribunal as required by Rule 3.3 of the Idaho Rules of Professional Conduct. There is no asserted factual basis for this claim and it should be dismissed.

E. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY RAISE LEGAL CHALLENGES.

1. ...By Failing to Object to the Prosecutor's Closing Argument.

There is no legal or factual basis for the claim and it should be dismissed.

2. ...By Failing to Adequately Challenge the Introduction of Statements Made by Petitioner to Law Enforcement.

Current counsel is apparently unaware of the extensive suppression hearing that was conducted in the case. There is no factual basis for the claim and it should be dismissed.

3. ...By Failing to Move for a Change of Venue.

Current counsel is apparently unaware of the extensive questioning of jurors concerning their knowledge of the case based on pre-trial publicity. There is no factual basis for the claim and it should be dismissed.

4. ...By Failing to Request a Special Jury Instruction That Would Require the Jury to Provide Written Findings Delineating the Mitigating Circumstances That Were Found.

The petitioner does not show that he has a constitutional or due process right to written findings by the jury. He has not claimed that any other state or the federal system requires that findings be made by a jury in a death penalty case. He only asserts that there cannot be meaningful appellate review without written findings. Obviously, the jury's guilt verdict can be reviewed without written findings. There is no showing that trial counsel was ineffective as claimed.

5. ...Failing to Challenge Idaho's "Heinous, Atrocious Or Cruel" Aggravating Circumstance, and the Respective Jury Instructions.

The petitioner has not claimed a constitutional deficiency with this aggravator or with the jury instruction. This allegation should be dismissed.

i., ii., iii.

The State moves to dismiss these claims for lack of legal or factual basis to support the claim. The instructions are available to the petitioner, but no specific discovery is claimed. The fact that the jury found this aggravator cannot be a basis for ineffective assistance of counsel.

6. ...Failing to Challenge the Utter Disregard for Human Life Aggravator.

i. ii., iii.

The State moves to dismiss, no legal or factual basis is shown in the petition. The jury instructions were immediately available to the petitioner before the filing of the petition. The petitioner does not point to any defect in the instructions. The claimed "jury error" in finding this aggravator cannot be ineffective assistance of counsel.

7. ...In Failing to Challenge the "Propensity" Aggravator as Found in Idaho Code § 19-2515(h)(8).

The State presumes that the petitioner is referring to the "Propensity" aggravator as set out in Idaho Code §19-2515(9)(h). The code section cited by the petitioner does not refer to an aggravator. The jury instruction describing that aggravating circumstance is currently available to the petitioner and as such is available for briefing and argument. The petitioner has given no legal or factual basis for this claim and so it should be dismissed. The State also notes that in the petitioner's claim number iii... that the "jury erred in finding it," referring to the aggravator, cannot be claimed as ineffective assistance of counsel. It is an appellate issue. This claim should be dismissed for that additional reason.

8. Ineffective Assistance of Counsel in Failing to Raise International Law Violations.

The State knows of no international law applicable to this case. The Petitioner apparently doesn't either since none are cited. This claim should be dismissed.

CONCLUSION

The State moves for the dismissal of this petition for the reasons stated. There is no genuine issue of material fact that would justify a hearing as required by Idaho Code §19-4906(c). The Court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State*, 125 ID 736 (Ct.App. 1987); *Baruth v. Gardner*, 110 ID 156 (Ct. App. 1986).

No showing has been made to support the petitioner's request for civil discovery. A request for civil discovery must be specific as to the items sought and the reasons demonstrating the need to protect his substantial rights. *Raudebaugh v. State*, 135 ID 602 (S.Ct. 2001). The State moves the Court to deny the request for civil discovery. The State further moves the Court to deny all of the grounds for relief requested for the reasons set out above.

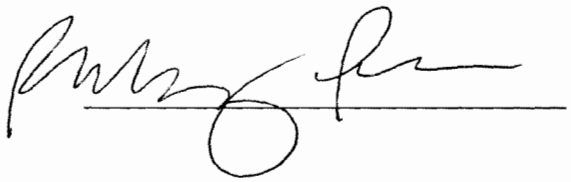
RESPECTFULLY SUBMITTED this 22nd day of March 2005.

GREG H. BOWER
Ada County Prosecutor

RBourne
Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to Mark Ackley, Kimberly Simmons, Erik Lehtinen, State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703, through the United States Mail, this 24 day of March 2005.



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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. SPOT0500155

RESPONSE TO STATE'S RESPONSE TO POST-CONVICTION RELIEF, STATE'S MOTION TO DISMISS, AND STATE'S OBJECTION TO CIVIL DISCOVERY

(Capital Case)

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his counsel at the State Appellate Public Defender, and responds to the State's answer to, and motion to dismiss, Petitioner's petition for post-conviction relief.

I.

THE STATE'S MOTION TO DISMISS IS PREMATURE

The State's motion to dismiss Petitioner's Petition For Post-conviction Relief (hereinafter "petition") is premature since at this stage in the proceeding Petitioner has not yet received the Reporter's Transcript or had sufficient opportunity to conduct a thorough investigation of the underlying criminal case. A claim of ineffective assistance of counsel requires review of the trial transcript to determine the nature, frequency and effect of counsel's errors, *Hoffman v. Arave*,

236 F.3d 523, 535 (9th Cir. 2001). Further, a copy of the transcript is necessary to provide to any independent experts retained by Petitioner. To request an expert to formulate an opinion prior to receipt of all relevant information such as the testimony of the State's experts, falls below professional standards of practice. Finally, Petitioner has not had sufficient time to conduct a thorough investigation for claims outside the record. *See Douglas v. California,* 372 U.S. 353, 358 (1963) (recognizing that even a thorough investigation of the record may not reveal all claims since often "the record is unclear or the errors are hidden" and noting that reliance solely on the record would likely render post-conviction proceedings "a meaningless ritual.")

II.

THE STATE'S MOTION TO DISMISS IS NOT ONLY PREMATURE, BUT INCOMPLETE AND MISLEADING

As noted above, it is impossible for Petitioner to file a final a complete list of claims before receipt of, and an opportunity to review, the Reporter's Transcript. Nevertheless, there are a few aspects of the State's Response which require response.

The first aspect of the State's Response which requires response is the fact that the State does not move to dismiss every claim. Petitioner's understanding is based on the fact that the State moves to dismiss only a limited number of claims, such as those it asserts to be purely legal. To this extent, the State recognizes the need to amend Petitioner's petition after a sufficient time for review of the transcripts and to conduct an independent investigation.

The second aspect of the State's Response which requires response is the fact that the State has misstated Petitioner's claims in an apparent attempt to prejudice the Court against Petitioner and his counsel. For example, in responding to Petitioner's Claim, B.1 ("Trial Counsel Failed To Retain Necessary Defense Experts"), subsections i – v, the State claims that "petitioner has no idea whether trial counsel hired any of the named experts or not and as such

has no evidence to support the claim." (Response, p. 4.) This is an incorrect assertion. As Petitioner noted, his counsel met with trial counsel for the purpose of identifying, at least in part, potential claims for post-conviction relief. As a result of that meeting, Petitioner stated the following: "Trial counsel failed to hire a forensic pathologist or other expert to review the autopsy results and make an independent determination of cause of death or injuries inflicted upon the victim prior to her death." (Petition, p. 12.) The State suggests that Petitioner and his counsel are lying to the Court. It is one thing to claim that there is no evidence to support the claim that trial counsel was ineffective for failing to utilized a pathologist, it is quite another to suggest that trial counsel did consult with one, contrary to a sworn statement made by Petitioner. If there is insufficient evidence to support the claim, then that is because Petitioner has not yet received the trial transcripts which would, at a minimum, include the testimony of the State's pathologist, an essential matter to be reviewed by a pathologist retained in post-conviction proceedings.

A second example of the State's attempt to prejudice this Court is contained in its response to Petitioner's Claim, B.2 ("Trial Counsel Failed To Adequately Investigate Circumstances Surrounding Petitioner's Prior Conviction For Statutory Rape"). The State claims that "petitioner does not point to any part of the medical records to support his conclusion and is apparently unaware that trial counsel represented the defendant in the earlier rape charge. (Response, p. 4.) Actually, Petitioner is aware that Amil Myshin represented him in the earlier rape charge; that does not change the fact that trial counsel failed to adequately investigate and prepare for Ms. Oliver's testimony in the murder case. Mr. Myshin's records from his prior investigation did not contain Ms. Oliver's medical records, so he could not rely on those for her cross-examination at trial. Petitioner has not yet obtained the medical records because trial

counsel has not cooperated in his requests to disclose their files. Petitioner has not located the records in the Clerk's Record; indeed, Petitioner believes they were not made part of the record.

A third example of the State's attempt to prejudice this Court against Petitioner and his counsel is in its response to Petitioner's Claim D.1 ("Trial Counsel Rendered Ineffective Assistance By Failure To Strike For Cause Or Utilize A Preemptory Strike Individual Jurors.") The State claims that Petitioner's counsel has violated their obligation of Candor to the Tribunal required by Rule 3.3 of the Idaho Rules of Professional Conduct. (Response, p. 5.) Petitioner submits that a careful review of his claim compared to the manner in which the State restates it, or misstates it, reveals that if any counsel has violated professional rules governing candor to the Court, it is the State. Petitioner has confirmed that the spouse of a deputy attorney general for the Idaho Department of Corrections did indeed sit on the jury. Petitioner believes this juror was the foreperson. Petitioner is investigating whether this juror was privy to prejudicial information both specific to Petitioner as well as general to inmates housed by the Department of Corrections.

The third aspect of the State's Response that deserves a response is the State's assertion that Petitioner has failed to assert any defects in the jury instructions. Petitioner limits this response to Claim E.5 and Claim E.6, set forth in their entirety below.

E. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ADEQUATELY RAISE LEGAL CHALLENGES.

* * *

5. Trial Counsel Rendered Ineffective Assistance By Failing To Challenge Idaho's "Heinous, Atrocious Or Cruel" Aggravating Circumstance, And The Respective Instruction To The Jury, As Unconstitutionally Vague And As Not Having Been Meaningfully Narrowed By The Idaho Supreme Court To Comport With The Eighth Amendment.

Respondent alleges that Petitioner "has not claimed a constitutional deficiency with this aggravator or jury instruction" and therefore asserts that the claim should be dismissed. (Response, p. 6.) Respondent is mistaken; the constitutional deficiency clearly alleged is that the aggravating circumstance contained in I.C. § 19-2515(9)(e), commonly known as the "heinous, atrocious or cruel" aggravator, is unconstitutionally vague. (Petition, p. 20.)

Dismissal is also improper because Petitioner has not yet had the opportunity to review the Reporter's Transcript to determine whether the Court provided any additional instructions to the jury beyond the written instructions, and to determine the manner in which the prosecutor argued the instruction. Until Petitioner receives and reviews the Reporter's Transcript, it is impossible to determine the full scope of this claim.

Petitioner provides the following additional legal analysis based solely on his review of the written jury instructions attached as an exhibit to the Clerk's Record. The instructions at issue provided:

> The terms especially "heinous," "atrocious," or "cruel," are considered separately; but in combination with "manifesting exceptional depravity." The terms heinous, atrocious or cruel are intended to refer to those first-degree murders where the actual commission of the first-degree murder was accompanied by such additional acts as to set the crime apart from the norm of first-degree murders.
>
> A murder is especially heinous if it is extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> The statutory aggravating factor does not exist unless the murder was especially heinous, especially atrocious, or especially cruel, and such heinousness, atrociousness or cruelty manifested exceptional depravity. It might be thought that every murder involves depravity. However, exceptional depravity exists only where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The terms "especially heinous manifesting exceptional depravity," "especially atrocious manifesting exceptional depravity,"

> or "especially cruel manifesting exceptional depravity" focus upon a defendant's state of mind at the time of the offense, as reflected by his words and acts.

Instruction No. 44.

The purpose of this instruction is to limit the scope of the aggravating circumstance to a narrow class of first-degree murders as required by the Eighth and Fourteenth Amendment. However, the aggravating circumstance and the limiting instruction were unconstitutionally vague and/or otherwise insufficient to channel the jury's discretion in a manner necessary to restrict the aggravator to a narrow class of first degree murders. *Maynard v. Cartwright*, 486 U.S. 356 (1988). Trial counsel rendered ineffective assistance of counsel by failing to object to this instruction on these grounds and by failing to submit the following argument.

In *State v. Osborn,* 102 Idaho 405, 631 P.2d 187 (1981), the Idaho Supreme Court attempted to narrow the application of the aggravator to only those cases where the murder is both "heinous, atrocious or cruel" and "manifest[s] exceptional depravity." *Osborn,* 102 Idaho at 418, 631 P.2d at 200 (quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973) and *State v. Simants*, 250 N.W.2d 881, 891 (Neb. 1977)). In addressing the meaning of "heinous, atrocious or cruel," the Idaho Supreme Court stated:

> The Florida Supreme Court interpreted this language as follows: "(W)e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies the conscienceless or pitiless crime **which is unnecessarily torturous to the victim**." Id. at 9. (Emphasis added)

Osborn, 102 Idaho at 418, 631 P.2d at 200 (emphasis added).

The *Osborn* Court adopted only a portion of the *Dixon* definition, specifically, that "heinous, atrocious or cruel" means: "extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." The *Osborn* Court did not limit the aggravator to crimes which are "unnecessarily torturous to the victim." Instead, the Court relied on the fact that the *Dixon* definition had been upheld by the U.S. Supreme Court in *Proffitt v. Florida,* 428 U.S. 242 (1976).

In *Proffitt*, the U.S. Supreme Court addressed the manner in which the Florida Supreme Court constructed the aggravator, stating:

> That court has recognized that while it is arguable "that all killings are atrocious, . . . (s)till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime **which is unnecessarily torturous to the victim**." State v. Dixon, 283 So.2d, at 9.

Proffitt, 428 U.S. at 255 (emphasis added). Thus, the *Dixon* definition *was* upheld, *but only because* a narrowing construction was applied limiting the aggravator to crimes which are "unnecessarily tortuous to the victim." This aspect of the *Proffitt* holding was overlooked by the Idaho Supreme Court which assumed the entirety of the instruction to be sufficient. Petitioner submits that the without the portion limiting the aggravator to crimes which are "unnecessarily tortuous to the victim," the *Dixon* definition is constitutionally deficient. This interpretation of the holding in *Proffitt* is confirmed by four subsequent U.S. Supreme Court cases: *Maynard v. Cartwright,* 486 U.S. 356 (1988); *Shell v. Mississippi*, 498 U.S. 1 (1990); *Sochor v. Florida*, 504 U.S. 527 (1992); and *Bell v. Cone,* ___ U.S. ___, 125 S.Ct. 847 (2005), all of which were decided after *Osborn.*

In *Shell v. Mississippi*, the Supreme Court rejected the portion of the *Dixon* limiting instruction utilized in Mississippi as constitutionally insufficient to save the vague aggravator. *Shell*, 498 U.S. at 1. The instruction at issue in Mississippi provided: "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others." *Shell,* 498 U.S. at 2.[1] This is in essence the portion of the *Dixon* instruction adopted by Idaho, and, as noted in Justice Marshall's concurrence, also determined to be insufficient in *Maynard v. Cartwright,* 486 U.S. at 361-364. *Shell,* 498 U.S. at 2.

In *Sochor v. Florida,* the Supreme Court clarified its holding in *Proffitt.* Specifically, the Court stated:

> Understanding the factor, as defined in *Dixon,* to apply only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim," we held in *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), that the sentencer had adequate guidance. See *id.,* at 255-256, 96 S.Ct., at 2968 (opinion of Stewart, Powell, and STEVENS, JJ.).

Sochor v. Florida, 504 U.S. at 536.

Most recently, the U.S. Supreme Court in *Bell v. Cone,* ___ U.S. ___, 125 S. Ct. 847 (2005), addressed the question of whether the narrowing construction presumed to have been applied by the Tennessee Supreme Court was constitutionally sufficient. The Court upheld the construction, noting that the Tennessee Supreme Court had consistently required a finding of torture to the victim before death or acts evincing a depraved state of mind. *Id.* ___ U.S. ___, 125 S. Ct. at 854-855. The Supreme Court cited past Tennessee opinions where "torture" involved a sufficient period of time for the victim to realize what was occurring and where "depraved state of mind" involved repetitive acts of violence unnecessary to accomplish murder. *Id,* at 855.

Just as the portion of the *Dixon* limiting instruction relied upon in *Osborn* and incorporated into Petitioner's jury instruction, is insufficient, so is the portion of the *Simants* instruction defining the phrase "manifesting exceptional depravity." In *Moore v. Clarke*, 904 F.2d 1226 (8th Cir. 1990), *cert. denied*, 504 U.S. 930 (1992), the Eighth Circuit explained that the use of "exceptional" is as vague and subjective as "especially," a standard rejected by the Supreme Court in *Maynard, supra.*

Thus, Instruction No. 44, which follows the definition in *Osborn*, is unconstitutionally vague, or otherwise insufficient to have guided the jury's discretion. Trial counsel should have objected to the aggravator itself, and the limiting instruction on the grounds that they are vague, overbroad and unhelpful to the jury. But for trial counsel's ineffectiveness, there is a reasonable likelihood that Petitioner would not have been sentenced to death based upon this factor.

i. The Unconstitutional Aggravating Circumstance Requires Re-Sentencing.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim. Nevertheless, Petitioner submits that because the jury weighed the unconstitutional aggravator in sentencing him to death, his death sentence must be vacated and he must either receive a new sentencing hearing or have his case reviewed anew by the state court. In a "weighing" state, if an aggravating circumstance is invalidated, but other valid aggravating circumstances remain, the sentencing calculus must be redone. *See, e.g., Clemons v. Mississippi,* 494 U.S. 738 (1990). Idaho is a "weighing" state. *See Williams v. Calderon,* 52 F.3d 1465, 1478 n.13 (9th Cir. 1995). Under *Clemons*, the invalidation of the aggravator requires resentencing, appellate reweighing, or appellate harmless error analysis. Because appellate reweighing and the error cannot be deemed harmless in light of *Ring v. Arizona,* 536 U.S. 584 (2002), resentencing is necessary. *But see State v. Hairston,* 133 Idaho

496, 509-510 988 P.2d 1170, 1183-1184 (1999) (holding that the invalidation of one aggravating circumstance does not invalidate a death sentence so long as the sentencer complied with Idaho's death penalty statute)

ii. Even If The Aggravating Circumstance Is Valid, The Jury Erred In Finding It In This Case.

After review of the transcripts and record in this case, Petitioner anticipates presenting evidence and law in support of this claim.

6. Trial Counsel Rendered Ineffective Assistance of Counsel In Failing to Challenge The Aggravating Circumstance, I.C. § 19-2515(9)(f), And The Respective Instruction To The Jury, That The Defendant Exhibited Utter Disregard For Human Life, As Unconstitutional.

The Court provided the jury with instructions regarding the aggravating circumstance contained in I.C. § 19-2515(9)(f), commonly known as the "utter disregard" aggravator. Specifically, Instruction No. 45:

> "Exhibited utter disregard for human life," with regard to the murder or the circumstances surrounding its commission, refers to acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. "Cold-blooded" means marked by absence of warm feeling: without consideration, compunction, or clemency, matter of fact, or emotionless. "Pitiless" means devoid of or unmoved by mercy or compassion. A "cold-blooded, pitiless slayer" refers to a slayer who kills without feeling or sympathy. The utter disregard aggravating factor refers to the defendant's lack of conscience regarding killing another human being.

Instruction No. 45A provided that

> The alleged aggravating circumstance of having acted with "reckless indifference to human life", (sic) with regard to the murder or the circumstances surrounding its commission, refers to conduct so wanton or reckless with respect to the unjustified infliction of harm as to be tantamount to a knowing willingness that it occur.

The purpose of these instructions was to define the "utter disregard" aggravator. Trial counsel should have objected to these instructions on the grounds that they are vague, overbroad

and unhelpful to the jury. The utter disregard factor is unconstitutionally vague, even with the definitions outlined in this instruction. The jury found the aggravating circumstance that the defendant exhibited utter disregard for human life. But for trial counsel's ineffectiveness, the Petitioner may not have been sentenced to death based upon this factor.

It was ineffective assistance not to challenge the constitutionality of the "utter disregard" aggravator. The Idaho Supreme Court ruled in *State v. Osborn*, 102 Idaho at 405, 631 P.2d 187 (1981), that the utter disregard aggravator "is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 102 Idaho at 419, 631 P.2d at 200. The Court added in *State v. Fain*, 116 Idaho 82, 774 P.2d 252 (1989), that this aggravator refers to the defendant's lack of conscientious scruples against killing another human being. *Id.* at 99. Petitioner recognizes that the Idaho Supreme Court upheld this factor by limiting its application. *Osborn*, 102 Idaho at 419, 631 P.2d at 200; *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983). Petitioner acknowledges that Idaho's utter disregard factor has also been upheld by the United States Supreme Court. *Arave v. Creech*, 507 U.S. 463 (1993). Even though both the Idaho Supreme Court and the United States Supreme Court have upheld this aggravator against constitutional challenge effective counsel will specifically challenge it in every pending capital case. *Osborn*, 102 Idaho 405; *Creech*, 507 U.S. 463.

Petitioner submits that the utter disregard aggravator is sufficiently devoid of meaningful content; is sufficiently vague and capable of application to any first degree murder, that it fails to fulfill its role of narrowing the class of murders to which it may be applied. It violates the Eighth and Fourteenth Amendments, and presumably Article I, Section 6 of the Constitution of the State of Idaho. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Maynard v. Cartwright*, 486 U.S. at 364

(1988). The manner in which the United States Supreme Court upheld Idaho's utter disregard factor actually demonstrates its invalidity.

Petitioner, before addressing the opinion of the United States Supreme Court in *Arave v. Creech*, wishes to put that decision in context by reviewing the opinion of the Ninth Circuit Court of Appeals that preceded it. As Mr. Creech's case wound its way through the federal court, the Ninth Circuit Court of Appeals found the utter disregard factor to be unconstitutional. Given this standard, we find that the narrowing construction of section 19-2515(g)(6), as applied to Creech, was unconstitutionally vague. Having concluded that the statutory language "the defendant exhibited utter disregard for human life" was too vague, the Idaho Supreme Court limited it by stating "the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Osborn*, 631 P.2d at 201.

This limiting construction gives no more guidance than the statute. Rather than defining "utter disregard," the court in *Osborn* merely emphasized it. But the problem with the "utter disregard" standard is not that it is too low a threshold, it is that it is unclear. Idaho's limiting construction does not resolve this infirmity. Just as it is difficult to determine what constitutes "utter disregard for human life," it is unclear what constitutes "the highest, the utmost, callous disregard for human life." The Supreme Court noted in *Cartwright*, 486 U.S. at 364, that the "contention that the addition of the word 'especially' somehow guides the jury's discretion, even if the term 'heinous' does not, is untenable." Cartwright's reasoning appears to apply here. *Creech v. Arave*, 947 F.2d 873 at 883-84 (9th Cir. 1991)(footnote omitted).

In discussing the constitutionality of the utter disregard factor the Supreme Court recognized that "the question is close." *Creech*, 507 U.S. at 475. The Supreme Court upheld the

utter disregard factor by assuming that the Idaho Supreme Court in *Osborn* limited its application to "the subclass of defendants who kill without feeling or sympathy," as opposed to those who "kill with anger, jealousy, revenge, or a variety of other emotions" or "take pleasure in killing." *Creech*, 507 U.S. at 476. To reach this conclusion, the Court explained its analysis of the *Osborn* gloss on the utter disregard factor by writing:

> Webster's Dictionary defines "pitiless" to mean devoid of, or unmoved by, mercy or compassion. Webster's Third New International Dictionary 1726 (1986). The lead entry for "cold-blooded" gives coordinate definitions. One, "marked by absence of warm feelings: without consideration, compunction, or clemency," *id.*, at 442, mirrors the definition of "pitiless." The other defines "cold-blooded" to mean "matter of fact, emotionless." *Ibid.* It is true that "cold-blooded" is sometimes also used to describe "premeditation," Black's Law Dictionary 260 (6th ed. 1990) -- a mental state that may coincide with, but is distinct from, a lack of feeling or compassion. But premeditation is clearly not the sense in which the Idaho Supreme Court used the word "cold-blooded" in Osborn. Other terms in the limiting construction -- "callous" and "pitiless" -- indicate that the court used the word "cold-blooded " in its first sense. "Premeditation," moreover, is specifically addressed else-where in the Idaho homicide statutes, Idaho Code § 18-4003(a) (1987) (amended version at Supp. 1992); had the *Osborn* court meant premeditation, it likely would have used the statutory language. In ordinary usage, then, the phrase "cold-blooded, pitiless slayer" refers to a killer who kills without feeling or sympathy.

Creech, 507 U.S. at 471-72.

Petitioner notes that of the two alternatives, "feeling or sympathy," only the former can be said to narrow the field of murderers to whom the phrase "without feeling or sympathy" can be applied. Who committing first degree murder can be said to be acting with sympathy for his victim? Therefore, according the United States Supreme Court, the utter disregard factor fulfills its Eighth Amendment limiting function by focusing on those who kill with an absence of feeling, ruling out those who "kill with anger, jealousy, revenge, or a variety of other emotions" or "take pleasure in killing." *Creech*, 507 U.S. at 476.

One problem with this analysis of the Supreme Court is that, in struggling to uphold the utter disregard factor, the Court adopted its own limiting construction of the aggravator; a construction which the Idaho Supreme Court never adopted before or after *Creech v. Arave, supra*. What is enlightening about the majority opinion is that a majority of the U.S. Supreme Court found that without this additional definition and limitation, the language of the utter disregard aggravator, even as refined by the Idaho Supreme Court's limiting construction, was too vague to pass constitutional muster. *Id.* Based upon this analysis, the constitutionality of the "utter disregard" aggravator factor is suspect and the U.S. Supreme Court may reconsider its decision.

Another reason why the U.S. Supreme Court may reconsider the constitutionality of the aggravator is the opinion in *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998). In *Wood,* the Idaho Supreme Court approved finding the utter disregard aggravator based on the defendant's sexual molestation of the victim prior to killing her and subsequently the sexual abuse of her body seven days after her death. *Id.* at 103-4, 967 P.2d at 717-8. Thus, in finding the (g)(6) aggravator to exist, the district court considered Wood's conduct seven days subsequent to the murder.

The Idaho Supreme Court has ruled that this aggravator must be limited to the "acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded pitiless slayer." *Osborn,* 102 Idaho at 419, 631 P.2d at 201. The issue is whether or not conduct committed seven days after the crime constitutes circumstances surrounding the crime. The Court held that the district court was correct in considering post-mortem conduct in the determination of the appropriate sentence. *Wood*, 132 Idaho at 104, 967 P.2d at 718. The Court noted that several states agree with the interpretation,

including Georgia and Nevada. *See Conklin v. State*, 254 Ga. 558, 331 S.E.2d 532, 539 (Ga. 1985) (holding that the offense of murder does not necessarily terminate at the instant of death); *Cavanaugh v. State*, 102 Nev. 478, 729 P.2d 481, 486 (Nev. 1986) (holding that post-mortem mutilation of body parts shows depravity of mind). However, some jurisdictions disagree with this analysis, holding that it is inappropriate to consider actions after the death of the victim because they are irrelevant in determining aggravating circumstances. *See Jackson v. State,* 451 So.2d 458, 463 (Fla.1984) ("Actions after the death of the victim are irrelevant in determining [the especially heinous, atrocious or cruel] aggravating circumstance."); *State v. Ortiz,* 131 Ariz. 195, 639 P.2d 1020, 1035 (1981) (Holding that to make out cruelty under the statute the evidence must show that the victim was made to suffer during the commission of the murder; cruelty cannot consist of abuse of the victim's body after his death.); and *State v. Preston,* 673 S.W.2d 1 (Mo. 1984) (holding that there was sufficient evidence supporting the aggravating circumstance because the victim was physically and psychologically tortured before death).

For a death sentence to be free from arbitrariness and capriciousness, "[t]he State must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Creech*, 507 U.S. at 471. The uncertainty in the meaning of this aggravator results in the specific arbitrary and capricious application of the death penalty that the Constitution does not allow. Based on *Wood* and challenges to similar aggravators pending around the country, failure to preserve the issue by a specific challenge was ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5, 6 and 13 of the Idaho Constitution.

III.

CONCLUSION

Petitioner respectfully requests that this Court refrain from ruling on any motion to dismiss Petitioner's petition for post-conviction relief. Petitioner has not received the Reporter's transcript, thus has not had the chance review it and formulate his claims, nor has Petitioner had the opportunity to conduct a full and adequate investigation outside the record. Petitioner has acted with diligence in preparing the initial petition and will undeniably seek this Court's leave to amend his Petition pursuant to I.C. § 19-4906(a) and ICR 15 from time to time as development of his case in post-conviction progresses.

DATED this 13th day April, 2005.

MARK J. ACKLEY
Deputy State Appellate Public Defender

for
KIMBERLY J. SIMMONS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this ___ day of April, 2005, served a true and correct copy of the forgoing RESPONSE TO STATE'S RESPONSE TO POST-CONVICTION RELIEF, STATE'S MOTION TO DISMISS, AND STATE'S OBJECTION TO CIVIL DISCOVERY as indicated below:

ROGER BOURNE
ADA COUNTY PROSECUTOR'S OFFICE
200 W. FRONT, SUITE 3191
BOISE ID 83702

_____ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
_____ Hand Delivery

ERICK VIRGIL HALL
INMATE # 33835
IMSI
PO BOX 51
BOISE ID 83707

_____ Statehouse Mail
_____ U.S. Mail
_____ Facsimile
_____ Hand Delivery

_____
GUADALUPE AYALA
Administrative Assistant

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **MOTION FOR PETITIONER ACCESS TO GRAND JURY TRANSCRIPTS** **(CAPITAL CASE)** ORIGINAL

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his counsel at the State Appellate Public Defender, and moves this Court for an Order granting Petitioner full access to the grand jury transcripts from the underlying capital case number H0300518, Grand Jury Case No. 03-35.

The grand jury transcripts are part of the record in this case. (R., p. 693 (Certificate of Exhibits).) Counsel in this case has a copy of the grand jury transcripts. *See* I.C.A.R. 32 ("in any criminal or post-conviction case where a documentary exhibit, including a presentence report, is transmitted to the Supreme Court for use in an appellate proceeding, the district court shall serve a copy of the documentary exhibit on the attorney general and on appellate counsel for the defendant, subject to the confidentiality provisions of I.C.A.R. 32."). Thus, the transcripts are available to Petitioner's counsel.

However, in reviewing the record thus far received, counsel noted restrictions imposed by the trial court on Mr. Hall's access to the grand jury transcripts. (R., pp. 24-26, 55-57, 68-71.) The trial court specifically decided that Mr. Hall could read the transcripts at the courthouse and could not take copies to read at the jail. (R., pp. 68-71.) The Orders apparently applied until the conclusion of the case. (R., pp. 25, 56.) Although it appears that the Orders are no longer in effect, in an abundance of caution Petitioner moves this court for an Order allowing him copies of the grand jury transcripts.

In Idaho capital cases, a Petitioner generally receives one opportunity to raise all challenges to his conviction and sentence in a petition for post-conviction relief. *State v. Rhoades*, 120 Idaho 795, 807, 820 P.2d 665, 677 (1991). Failure to raise all issues which were known or should have been known may constitute waiver of such claims. I.C. § 19-2719(5); *see Pizzuto v. State*, 127 Idaho 469, 471-472, 903 P.2d 58, 60-61 (1995)(upholding dismissal of fact-specific claims raised in successive petition for post-conviction relief based on irregularities that occurred in criminal case because such claims were known by petitioner at time of prior petition). Both equal protection and due process require that the state provide Petitioner an adequate opportunity to present his claims fairly. *See Evitts v. Lucey*, 469 U.S. 387, 396, 403-06 (1985)(imposing procedural impediments to effective assistance of counsel on appeal as of right under state statute implicates both equal protection and due process); *Lane v. Brown*, 372 U.S. 477, 485 (1963)(holding that where a state cannot deny transcripts to indigent criminal defendants at post-conviction or on appeal, neither can the state's statutory scheme allow the public defender's office to refuse to order those transcripts without violating the Fourteenth Amendment); *Entsminger v. Iowa*, 386 U.S. 748, 751-752 (1967)(holding counsel's waiver on appeal of petitioner's right to a full transcript violated due process). In a capital case, the Eighth

Amendment is also implicated, and defendants facing a death sentence are entitled to heightened procedural safeguards. *See Hoffman v. Arave*, 236 F.3d 523, 539-540 (9th Cir. 2001); *citing Lankford v. Idaho*, 500 U.S. 110, 125-27 (1991).

In this case, information contained within these transcripts is relevant to Mr. Hall's special appellate proceedings. (*See* R., pp. 16-21; 186-188 (irregularities in return of Indictments)); *see also, e.g., Hoffman*, 236 F.3d at 535 (reasoning that a claim of ineffective assistance of counsel requires review of the trial transcripts to determine the nature, frequency and effect of counsel's errors). This early in the post-conviction proceedings, and without the receipt of transcripts, it is impossible to determine whether trial counsel effectively investigated and litigated any grand jury irregularities. It is critical that Mr. Hall review the materials already received by this office.

The grand jury transcripts are two hundred and seventy-three (273) pages. The transcripts are dense, often dealing with forensic science, locations and timelines, and their review will take considerable time. The review will also be an ongoing exercise. Once the trial transcripts are received, Petitioner will need to compare grand jury testimony to trial testimony.

Counsel's copies of the grand jury transcripts contain no names of grand jurors. Furthermore, every witness who testified before the grand jury either (a) testified at trial, or (b) will be thoroughly investigated during post-conviction. By contrast, the clerk's record itself—already available to Petitioner—does contain grand jury names, so disclosure of the grand jury transcripts does not in any way disclose additional confidential information to Petitioner.

Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Idaho Constitution, and matters of record, Petitioner respectfully asks this Court for access to the grand jury transcripts.

DATED this 7th day September, 2005.

MARK J. ACKLEY
Lead Counsel, Capital Litigation Unit

PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 14th day of September, 2005, served a true and correct copy of the forgoing MOTION FOR PETITIONER ACCESS TO GRAND JURY TRANSCRIPTS as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	_____ Statehouse Mail _____ U.S. Mail _____ Facsimile __X__ Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	__X__ Statehouse Mail _____ U.S. Mail _____ Facsimile _____ Hand Delivery

GUADALUPE AYALA
Administrative Assistant

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **NOTICE OF HEARING** **(CAPITAL CASE)**

COMES NOW, Erick Virgil Hall, Petitioner, provides notice that a hearing will be held regarding the Motion For Petitioner Access To Grand Jury Transcripts. Due to the Court's calendar, the hearing will be held before the Honorable Thomas F. Neville at 200 W. Front St., Boise, Idaho on the 3rd day of October, 2005, at 1:30 p.m. (MDT).

DATED this 7th day of September, 2005.

ORIGINAL

Paula M. Swensen
PAULA M. SWENSEN,
Deputy State Appellate Public Defenders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of September, 2005, served a true and correct copy of the attached NOTICE OF HEARING by the method indicated below:

ROGER BOURNE	_____ Statehouse Mail
ADA COUNTY PROSECUTOR'S OFFICE	_____ U.S. Mail
200 W. FRONT, SUITE 3191	_____ Facsimile
BOISE ID 83702	_/_ Hand Delivery
ERICK VIRGIL HALL	_X_ Statehouse Mail
INMATE # 33835	_____ U.S. Mail
IMSI	_____ Facsimile
PO BOX 51	_____ Hand Delivery
BOISE ID 83707	

GUADALUPE AYALA
Administrative Assistant

Session: Neville100305 Division: DC Courtroom: CR507
Session Date: 2005/10/03 Session Time: 08:32
Judge: Neville, Thomas F.
Reporter: Hirmer, Jeanne

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):
Smethers, David

Prob. Officer(s):

Court interpreter(s):

Case ID: 0023
Case Number: SPOT0500407
Plaintiff: IDAHO, STATE OF
Plaintiff Attorney: ACKLEY, MARK
Defendant: HALL, ERICK VIRGIL
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2005/10/03
13:52:14 - Operator
Recording:
13:52:14 - New case
HALL, ERICK VIRGIL
13:52:38 - Judge: Neville, Thomas F.
Petitioner not present for the record.
13:52:53 - Judge: Neville, Thomas F.
Court met in chambers off the record regarding Mr. Hall's Mo tion for access
13:53:08 - Judge: Neville, Thomas F.
to G/J transcript. Court understands there is a stipulation regarding the
13:53:44 - Judge: Neville, Thomas F.
transcript.
13:53:51 - State Attorney: BOURNE, ROGER
Mr. Bourne advised the Court that one witness had said where she was employed
13:54:20 - State Attorney: BOURNE, ROGER
and that portion to be redacted.
13:54:35 - Judge: Neville, Thomas F.
Court
13:54:43 - State Attorney: BOURNE, ROGER

Mr. Bourne stated petitioner will have entire trial transcri
pt anyway, and
13:54:58 - State Attorney: BOURNE, ROGER
same witnesses testified at grand jury that testified at tri
al
13:55:12 - Judge: Neville, Thomas F.
The Court had provided access to defendant on a number of oc
assions for
13:56:05 - Judge: Neville, Thomas F.
review of documents. I.C.R. states Court shall allow access
but that the
13:56:33 - Judge: Neville, Thomas F.
Court can place restrictions on them. Court knows that Mr.
Ackley has
13:57:12 - Judge: Neville, Thomas F.
probably told his clients that on many ocassions and will re
quest that Mr.
13:57:27 - Judge: Neville, Thomas F.
Ackley provide an order with those restrictions. Court un
derstands Mr.
13:57:56 - Judge: Neville, Thomas F.
Ackley will be filing a motion regarding scheduling.
13:58:25 - Operator
Stop recording:

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **STIPULATION FOR RELEASE OF JURY QUESTIONNAIRES AND FOR ADDITIONS TO THE REPORTER'S TRANSCRIPT** (Capital Case)

COMES NOW the Petitioner, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender, and the Respondent, by and through its representative, Roger Bourne, and respectfully request this Court to enter the proposed orders based on the following:

1. Petitioner has contacted the Respondent regarding the release of the completed jury questionnaires in the underlying criminal case, Case No. H0300518, submitting that the questionnaires are relevant to claims raised in his initial petition for post-conviction relief. *See e.g.,* Claim D ("Deprivation of effective assistance of counsel during the jury selection process"). **STIPULATION:** The parties stipulate that this Court should order the clerk or the jury commissioner to permit the Petitioner to inspect and copy the completed jury questionnaires submitted by all prospective jurors in the underlying criminal case.

2. Petitioner has contacted the Respondent regarding the preparation of additional transcripts based on recorded but untranscribed portions of the underlying criminal proceedings, submitting that preparation of the transcripts are required by law, and relevant to claims raised in his initial petition for post-conviction relief. *See e.g.,* I.A.R. 25(d), I.A.R. 25(f); Claim D ("Deprivation of effective assistance of counsel during the jury selection process"); and Claim E.2 ("Trial counsel rendered ineffective assistance by failing to adequately challenge the introduction of statements made by petitioner to law enforcement"). **STIPULATION:** The parties stipulate that the court reporter should transcribe the following:

   a. The recorded, but untranscribed, exercise of peremptory challenges by both parties during the jury selection process (Tr., p. 3376, Ls. 12-13 ("Peremptory challenges exercised by counsel.")));

   b. The recorded, but untranscribed, playing of the audio-visual recording of the Petitioner's statements to law enforcement (Tr., p. 4185, L. 22 ("Video partially played for the jury.); p. 4205, L. 22 ("Tape played for the jury."); p. 4208, Ls. 22-23 ("Tape fast forwarded and tape played to its conclusion.")).

DATED this 28th day October, 2005.

MARK J. ACKLEY
Deputy, State Appellate Public Defender

ROGER BOURNE
Deputy, Ada County Prosecutor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 31 day of October, 2005, served a true and correct copy of the forgoing STIPULATION FOR RELEASE OF JURY QUESTIONNAIRES AND FOR ADDITIONS TO THE REPORTER'S TRANSCRIPT as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ Statehouse Mail ____ U.S. Mail ____ Facsimile X Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	X Statehouse Mail ____ U.S. Mail ____ Facsimile ____ Hand Delivery

Melissa Pickens for
GUADALUPE AYALA
Administrative Assistant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

A.M. FILED P.M. 4:00

NOV 15 2005

J. DAVID NAVARRO, Clerk
By DEPUTY

ERICK VIRGIL HALL,

Petitioner,

v.

THE STATE OF IDAHO,

Respondent.

Case No. SPOT0500155

ORDER ALLOWING PETITIONER ACCESS TO AND POSSESSION OF GRAND JURY TRANSCRIPTS SUBJECT TO CONDITIONS

Motion having been made, hearing having been held on October 3, 2005, and the Court otherwise being fully informed,

It is hereby ordered that Petitioner's counsel may provide a copy of the grand jury transcripts, Grand Jury Case No. 03-35, to Petitioner. Petitioner's counsel shall redact said transcripts to eliminate the reference to the current employer of grand jury witness Deidre Palmquist, said reference being at page 150, line 19, of the April 22, 2003, transcript of the above grand jury proceedings. The court further orders that Petitioner shall not make copies of the grand jury transcripts or otherwise communicate the content of the grand jury transcripts with any person other than counsel and counsel's agents.

It is so ordered.

Dated this 15th day of ~~October~~ November, 2005.

THOMAS F. NEVILLE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of ~~October~~ November, 2005, I served a true and correct copy of the foregoing ORDER GRANTING PETITIONER ACCESS TO AND POSSESSION OF GRAND JURY TRANSCRIPTS SUBJECT TO CONDITIONS by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	____ U.S. Mail ____ Statehouse Mail __X__ Facsimile - Email ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail __X__ Facsimile - Email ____ Hand Delivery

Deputy Clerk

NO. _____
FILED A.M. P.M. 4:00
NOV 15 2005
J. DAVID NAVARRO, Clerk
By _____ DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. SPOT0500155

ORDER FOR PREPARATION OF ADDITIONAL TRANSCRIPTS

(Capital Case)

Stipulation having been made and the Court otherwise being sufficiently advised,

IT IS HEREBY ORDERED that the Petitioner's request for the preparation of additional transcripts is GRANTED.

IT IS FURTHER ORDERED that the court reporter shall transcribe the following:

a. The recorded but untranscribed portion of the jury selection process pertaining to the parties' exercise of their peremptory challenges (Tr., p. 3376, Ls. 12-13 ("Peremptory challenges exercised by counsel."));

b. The recorded but untranscribed portion of the trial where the audio-visual recording of the Petitioner's statements to law enforcement was played for the jury (Tr., p. 4185, L. 22 ("Video partially played for the jury."); p. 4205, L. 22 ("Tape played for the jury."); p. 4208, Ls. 22-23 ("Tape fast forwarded and tape played to its conclusion.")).

Dated this 15th day of November, 2005.

THOMAS F. NEVILLE
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of November, 2005, I served a true and correct copy of the foregoing ORDER FOR PREPARATION OF ADDITIONAL TRANSCRIPTS by method indicated below to:

MARK ACKLEY STATE APPELLATE PUBLIC DEFENDER 3647 LAKE HARBOR LANE BOISE ID 83703	_____ U.S. Mail _____ Statehouse Mail __x__ Facsimile - Email _____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	_____ U.S. Mail _____ Statehouse Mail __x__ Facsimile - Email _____ Hand Delivery

cc: John Gambee

Deputy Clerk

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **MOTION FOR DISCOVERY** **(CAPITAL CASE)**

COMES NOW the Petitioner, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender (hereinafter "SAPD"), and moves this Honorable Court pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Sections 5, 6, 7, and 8 of the Idaho Constitution, I.C. § 19-4901 et seq., § 19-2719, and I.C.R. 57(b) to order discovery. In support of this motion, the Petitioner relies on his Memorandum in Support of Motion for Discovery and moves the Court for an order granting discovery as specified below.

Before identifying Petitioner's specific requests for discovery, Petitioner requests the Court's consideration of the following prefatory note regarding the appendices contained herein

and their respective attachments. The attachments are voluminous but necessary. The purpose of the attachments is three-fold: first, to demonstrate to the Court the measures taken to preclude requests for matters previously disclosed; second, to assist the State in identifying legible and complete copies of documents requested; and third, to create a record for appellate and post-conviction purposes identifying illegible, redacted, or otherwise incomplete documents bearing upon trial counsels' ability to prepare an adequate defense.

SPECIFIC DISCOVERY REQUESTED

I. Witnesses, Prospective Witnesses, and Other Persons of Interest.

A. **Lisa Manora Lewis.** According to police reports, Ms. Lewis told Detective Dave Smith and Scott Birch of the Attorney General's Office that she and Peggy Jean Colbert Hill spoke to Ms. Henneman regarding directions back to the DoubleTree Inn. Purportedly, Petitioner and Patrick Bernard Hoffert then arrived, at which point Petitioner spoke briefly to Ms. Henneman. For unknown reasons, the State opted not to call Ms. Lewis to testify. Petitioner requests the following:

1. Prosecuting attorney documents.[1]

2. All statements and summaries of statements to law enforcement, including Scott Birch, either made by or attributed to Ms. Lewis, regardless of medium, and all reports and notes made by law enforcement about Ms. Lewis, including those made by Scott Birch.

3. All statements and summaries of statements to, and reports or notes by, SRO Mike Barker.

[1] "Prosecuting attorney documents" refers to memoranda, notes, or recordings prepared by the prosecutors and their investigators that contain statements or summaries of statements based on their interviews, or their presence during interviews, with any person during the course of their investigation and preparation for the underlying criminal case regardless of whether such individual ever testified at trial.

B. **Peggy Jean Colbert Hill.** Ms. Hill confirmed Ms. Lewis' story when interviewed by Detective Dave Smith and Scott Birch. Additionally, Ms. Hill noticed Ms. Henneman's yellow sapphire ring and recalled that Petitioner left with Ms. Henneman. The State did not call her to testify. Petitioner requests the following:

1. Prosecuting attorney documents.

2. All statements and summaries of statements to law enforcement, including to Scott Birch, either made by or attributed to Ms. Hill, regardless of medium, and reports and notes made by law enforcement about Ms. Hill, including those made by Scott Birch.

3. All statements and summaries of statements to, and reports or notes by, SRO Mike Barker.

C. **Patrick Bernard Hoffert.** Mr. Hoffert was with Ms. Lewis and Ms. Hill at the time they saw Petitioner near the Greenbelt, and met Lynn Henneman. Mr. Hoffert is a person of interest in the Henneman homicide. He committed suicide the night after the homicide. Petitioner requests the following:

1. All reports and investigative notes regarding the death of Patrick Bernard Hoffert, including but not limited to:

   a. Law enforcement reports and notes related to Mr. Hoffert's suicide at 408 E. 51st St. #6, Garden City, Idaho, on September 25, 2000.

   b. Law enforcement reports and notes related to Garden City PD Incident No. 01-2000-03006, whether generated by Garden City or other law enforcement agencies.

2. Copies of all audio and video-taped interviews conducted in connection with Mr. Hoffert's death, including but not limited to the interviews of Verdell Jean Stirm/Rugger and Deirdre Muncy.

3. Any writings attributed to Mr. Hoffert on the day of his suicide, including but not limited to property collected by Garden City Police Department (hereinafter "GCPD") from the suicide investigation, including "notebook w/ notes from Hoffert," property no. 12448.

4. Results of any forensic testing conducted upon the 1989 black Toyota, VIN JT4RN13P4K0005180, property no. 12455.

5. Coroner/ pathology notes and reports regarding the death of Mr. Hoffert.

6. Any DNA or other forensic profile developed on Mr. Hoffert.

7. Detective Allen's supplemental report on the suicide scene.

D. **Chris Hall.** Mr. Hall was a person of interest in the Lynn Henneman homicide investigation. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. All statements and summaries of statements to law enforcement either made by or attributed to Mr. Hall, regardless of medium, and all reports and notes made by law enforcement about Mr. Hall.

E. **Christian Johnson.** Mr. Johnson testified for the State at trial. (Tr., pp. 3760-3813.) He was initially a suspect in the Henneman homicide. (Tr., p. 3776.) Mr. Johnson may have been represented by the Ada County Public Defender's office during or prior to his testimony, and had charges pending against him at the time of trial. (Tr., p. 3776.) Petitioner requests the following:

1. Prosecuting attorney documents.

2. Any and all incentives to testify against Erick Hall explicitly or implicitly offered to, or requested by, this witness.[2]

3. All statements and summaries of statements to law enforcement either made by or attributed to Mr. Johnson, regardless of medium, and all reports and notes made by law enforcement about Mr. Johnson.

[2] Incentives to testify include, but are not limited to, agreements, expectations or promises of leniency, favorable prison or jail treatment, and accommodations or improved conditions of confinement. Further, all discovery requests related to plea negotiations and/or incentives to testify include any type of documents or audio or video recordings that contain any reference to any form of interaction with any witness or prospective witness and/or his/her attorney regarding plea negotiations and/or favorable treatment regardless of the outcome of any proceeding and regardless of whether favorable negotiations or treatment were in fact provided.

4. A complete NCIC criminal record check, including juvenile criminal records.

5. Documentation or summaries of all off-record and/or ex parte conversations regarding Mr. Johnson's criminal history or ongoing criminal proceedings. (Tr., p. 3676, Ls. 12-17.)

6. Documents or summaries of plea negotiations related to the case for which Mr. Johnson made an appearance on or about 10/13/04. (Tr., p. 3676.)

7. Any search warrant from any search and seizure of Mr. Johnson. (Tr., p. 3783).

8. All reports and notes from Idaho Department of Corrections and Idaho Department of Probation and Parole including, but not limited to:

   a. Copies of any self-initiated requests for parole and/or probation from September 2000 to present.

   b. Documentation of parole or probation hearings and results, from September 2000 to present.

   c. Copies of any parole and/or probation plans from September 2000 to present.

   d. Reports or notes or other documentation made by Mr. Johnson's parole or probation officer from September 2000 to present.

   e. Documentation from any probationary search and seizure from Mr. Johnson's residence or personal effects stored at any other location.

F. **Miriam Colon.** Ms. Colon testified for the State at trial. (Tr., pp. 3564-3602.)

1. Prosecuting attorney documents.

2. All statements and summaries of statements to law enforcement either made by or attributed to Ms. Colon, regardless of medium, and all reports and notes made by law enforcement about Ms. Colon.

3. A complete NCIC criminal record check, including juvenile criminal records.

G. **Norma Jean Oliver.** Ms. Oliver testified against Petitioner at his sentencing, claiming that Petitioner had previously forcibly raped her. (Tr. pp. 4756-4783.) Her testimony related to alleged events culminating in Petitioner's guilty plea to statutory rape in State v. Hall, Ada County Case No. M9108836/HCR18591.

Records sought by but not utilized by trial counsel, indicate significant and material inconsistencies between Ms. Oliver's sentencing testimony and information she previously provided to law enforcement and medical personnel near the time of the purported forcible rape. Based on her erratic behavior and sentencing testimony, there is reason to doubt whether she was competent to testify.[3] Accordingly, Petitioner requests the following discovery regarding this witness:

1. Prosecuting attorney documents.

2. All statements and summaries of statements to law enforcement either made by or attributed to Ms. Oliver, regardless of medium, and all reports and notes made by law enforcement about Ms. Oliver.

3. Any incentives to testify against Erick Hall explicitly or implicitly offered to, or requested by, Ms. Oliver.

4. Transcript of hearing to release 1992 Presentence Investigation Report held on 10/28/03.

5. A complete NCIC criminal record check, including juvenile criminal records.

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[3] (Tr., pp. 4755-4756 (noting Ms. Oliver was "too distraught to even talk to" defense counsel); p. 4777, Ls. 2-7, p. 4783, Ls. 17-18 (noting that she had been on medication but was not at the time of testifying, even though she admitted having a chemical imbalance); pp. 4756-4782 (indicating she could not recall several aspects of the alleged forcible rape); p. 4780 (noting that she was on SSI because she has a chemical imbalance and is unable to keep a job); pp. 4952-4954 (indicating that forcible rape charges had been reduced to statutory rape because she was "vulnerable," "fragile," and "unable to effectively go on with the case in front of a jury" or withstand cross-examination based in part on the recommendation of her treatment providers).)

6. All documentation and recordings relating to Ms. Oliver's arrest as a runaway on or about 12/04/91, including any statements made to the arresting officers, jail or juvenile authorities, and any dispatch or other recordings, including the entire juvenile criminal file stemming from that arrest.[4]

7. Information regarding Ms. Oliver's mental health, competency, or veracity, regardless of whether documentation exists, known by the prosecution in the underlying criminal case.

8. Information regarding the investigation of the reported rape of Ms. Oliver, and subsequent charging, arrest, plea negotiations and plea entry Petitioner in State v. Hall, Case No. M9108836:

   a. A complete transcript of the proceedings including a transcript of the grand jury proceedings.

   b. A "contact sheet" of all photos taken of Ms. Oliver after the alleged rape.

   c. Color copies of all photos taken of Ms. Oliver after the alleged rape and not submitted as an exhibit in Petitioner's current case.

   d. The name of the person with whom Ms. Oliver stayed at the Sands Motel on or about 12/04/91, after the alleged rape and prior to her arrest as a runaway, and any documentation of communication with that person.

   e. Any notes, memoranda or other documents memorializing oral communications made during plea negotiations held by the Ada County Prosecutor's office.

   f. All files created by or held by the Ada County Public Defender's office related to State v. Hall, Case No. M9108836, including documentation pertaining to plea negotiations.

   g. All reports and notes, photographs, audio and video recordings, including, but not limited to:

      i. Tape-recorded statement made to the Garden City Police Department (hereinafter "GCPD") by Erick Hall on or about 12/04/91.

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[4] According to reports, Mr. Hall reported Ms. Oliver to authorities as a runaway. It was only after her subsequent arrest and detention, did Ms. Oliver allege that Erick had raped her.

ii. Tape-recorded statement made to GCPD by Norma Jean Oliver on or about 12/04/91.

h. Admission from the Ada County Prosecutor that state discovery page numbers 120-138 were disclosed in discovery to defense counsel, as stated in the State's "Informal Discovery Letter" dated 01/16/04, confirmation that the prosecutor's office hand-writes discovery page numbers on the lower right corner of each page turned over in discovery, and copies of said discovery pages with such discovery page numbers clearly visible.

i. All reports, notes and other documents made by Dr. Lawrence Vickman, St. Alphonsus Regional Medical Center, regarding the examination and treatment of Ms. Norma Jean Oliver in or around December 1991.

j. Results of DNA or other forensic testing conducted on vaginal and anal swabs and articles of clothing belonging to Ms. Oliver.

k. Information regarding Ms. Oliver's mental health, competency, or veracity, regardless of whether documentation exists, known by the prosecution in the underlying criminal case as well as Case No. M9108836.

l. All mental health, psychological and/or psychiatric records, including all reports, notes and other documents, held or created by Intermountain Hospital, Dr. Lamar Heyrend, counselor Margaret Farmer, and Bonnie Pitman for Ms. Oliver.

m. Social Security Income records, including all application materials, of Norma Jean Oliver. (Tr. p., 4780.)

H. **Detective Daniel Hess.** Detective Hess's testimony bolstered Ms. Oliver's testimony. (Tr., pp. 4784-4813.) Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. All records, reports or other documents obtained by Det. Hess or other law enforcement in the course of investigation and prosecution of the 1991 Norma Jean Oliver rape case, with specific information as to when the documents were obtained and by whom.

I. **Jay Rosenthal.** Mr. Rosenthal was the deputy prosecuting attorney for Ada County in the aforementioned Norma Jean Oliver rape case. Mr. Rosenthal testified that he amended the charges from forcible rape to statutory rape because Ms. Oliver "simply was unable to effectively go on with the case in front of a jury." (Tr., pp. 4952-4953.) Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Explanation as to why the charge of forcible anal intercourse was dismissed even though the grand jury indicted on this charge. Mr. Rosenthal testified as to why the forcible vaginal rape charge was pled down to statutory rape, but he did not testify, nor was he asked, why the indictment was amended to delete the forcible anal rape charge.

3. All records, reports or other documents obtained by the prosecuting attorney or his agents in the course of investigation and prosecution of the 1991 Norma Jean Oliver rape case, with specific information as to when the documents were obtained and by whom.

J. **April Sebastian**. Ms. Sebastian testified against Petitioner at his sentencing while represented by Petitioner's trial counsel on an upcoming "rider" hearing, Ada County Case No. H0400228. (Tr., pp. 4868-70; pp. 4875-96.) Ms. Sebastian also had another active case, Ada County Case No. H0400335, at the time of her testimony. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Any incentives to testify against Erick Hall explicitly or implicitly offered to, or requested by, this witness.

3. Copy of the Presentence Investigation Report for Case No. H0400335/M0401584.

4. Copy of the Presentence Investigation Report, including "Addendum to Presentence Investigation Report" and any document purporting to make "rider" recommendations in Case No. H0400228.

5. All statements and summaries of statements to law enforcement either made by or attributed to April Sebastian, regardless of medium, and all reports and notes made by law enforcement about Ms. Sebastian, from March 1, 2003 to present.

6. A complete NCIC criminal record check, including juvenile criminal records.

7. All reports and notes from Idaho Department of Corrections and Idaho Department of Probation and Parole including, but not limited to:

   a. Copies of any self-initiated requests for parole and/or probation for case number, from March 2003 to present.

   b. Documentation of parole or probation hearings and results, from March 2003 to present.

   c. Copies of any parole and/or probation plans, from March 2003 to present.

   d. Reports or notes or other documentation made by Ms. Sebastian's parole or probation officer, from March 2003 to present.

K. **Michelle Deen**. Ms. Deen testified against Petitioner at his sentencing. (Tr., pp.4813-39.) Petitioner recently discovered that Ms. Deen was convicted of at least two felonies, only one of which was elicited at trial. In addition, Petitoner has discovered that Amil Myshin represented Ms. Deen during the entry of a guilty plea on 12/03/03 in Ada County Case No. H0301398. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Documentation of initial contact between Michelle Deen and the prosecuting attorney's office.

3. Any and all incentives to testify against Erick Hall explicitly or implicitly offered to, or requested by, this witness.

4. All statements and summaries of statements to law enforcement either made by or attributed to Ms. Deen, regardless of medium, and all reports

and notes made by law enforcement about Ms. Deen, from March 2003 to present.

5. A complete NCIC criminal record check, including juvenile criminal records.

6. All police reports, notes and recordings regarding theft, breaking and entering, burglary or similar crimes stemming from incidents reported by Erick Hall and/or Janet Hoch against Michelle Deen and/or Tommy Workman and to which law enforcement responded in or around July 2001.

7. Documents related to Ada County Case No. H0200584:

   a. Copy of the Presentence Investigation Report, including any probation revocation report, reports or recommendations from the Jurisdictional Review Committee or any other addenda;

8. Documents related to Ada County Case No. H0301398:

   a. Copy of the Presentence Investigation Report, including any probation revocation report, reports or recommendations from the Jurisdictional Review Committee or any other addenda;

   b. Copy of the psychological evaluation ordered by the district court in June 2004 in Case No. H0301398, a mere four months before Ms. Deen testified at Petitioner's sentencing.

9. All reports and notes from the Idaho Department of Corrections and Idaho Department of Probation and Parole including, but not limited to:

   a. Copies of any self-initiated requests for parole and/or probation for case number, from March 2003 to present.

   b. Documentation of parole or probation hearings and results, from March 2003 to present.

   c. Copies of any parole and/or probation plans, from March 2003 to present.

   d. Reports or notes or other documentation made by Ms. Deen's parole or probation officer, from March 2003 to present.

L. **Evelyn Dunaway**. Ms. Dunaway testified against Petitioner at his sentencing. (Tr., pp. 4857-68.) Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Any incentives to testify against Erick Hall explicitly or implicitly offered to or requested by this witness.

3. All statements and summaries of statements to law enforcement either made by or attributed to Ms. Dunaway, regardless of medium, and all reports and notes made by law enforcement about Ms. Dunaway, from March 2003 to present.

4. A complete NCIC criminal record check, including juvenile criminal records.

5. All police reports, notes, recordings and witness statements regarding a domestic dispute or incident between Evelyn Dunaway and Erick Hall to which law enforcement responded in or around March 2002. (Tr., pp. 4858 L.24 – p. 4864, L.11.)

6. All reports and notes from Idaho Department of Corrections and Idaho Department of Probation and Parole including, but not limited to:

   a. Copies of any self-initiated requests for parole and/or probation for case number, from March 2003 to present.

   b. Documentation of parole or probation hearings and results, from March 2003 to present.

   c. Copies of any parole and/or probation plans, from March 2003 to present.

   d. Reports or notes or other documentation made by Ms. Dunaway's parole or probation officer, from March 2003 to present.

M. **Rebecca McCusker**. Ms. McCusker testified against Petitioner at his sentencing. (Tr., pp. 4857-68.) Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Any and all incentives to testify against Erick Hall explicitly or implicitly offered to or requested by this witness.

3. All statements and summaries of statements to law enforcement either made by or attributed to Ms. McCusker, regardless of medium, and all reports and notes made by law enforcement about Ms. McCusker.

4. A complete NCIC criminal record check, including juvenile criminal records.

5. All records, notes and documents created by or in the possession of Idaho Department of Health and Welfare regarding Rebecca McCusker, including, but not limited to allegations of child neglect or abandonment.

N. **Dr. Glenn Groben and the Ada County Coroner's Office.**

1. All bench notes from the Lynn Henneman autopsy, sexual assault kit and any other procedures performed or observed by Dr. Groben or any other Ada County Coroner personnel.

2. Any peer review, formal or informal, whether internal or external to the Ada County Coroner's Office, as well as any documentation related thereto, of the autopsy performed on Ms. Henneman (Tr., p. 4097, Ls. 19-22.), or confirmation that no peer review was conducted.

3. Any notes, reports, or dictations of findings made by Dr. Groben in the following locations:

   a. At or near the body recovery scene; and
   b. At or near the alleged crime scene near the Main St. Bridge.

4. Ada County Coroner's Office procedures for body removal and preservation. (Tr., p. 4095, Ls. 2-21.)

5. Copies of the full body x-rays taken of Lynn Henneman, and full disclosure of where, when and by whom the x-rays were taken.

6. Any toxicology test results from Idaho labs; and if none exist, then an explanation why testing was conducted by a Texas laboratory, and a complete copy of the Texas report. (Petitioner currently is in possession of a one-page toxicology report from the Texas lab.)

7. A list of all cases, regardless of jurisdiction, in which Dr. Groben conducted autopsies wherein broad ligature strangulation, drowning, or blunt force trauma was the cause, suspected cause, or explicitly excluded cause of death, including specific identification of those "other cases exactly like this" referenced by Dr. Groben in his trial testimony.[5]

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[5] (Tr., p. 4056, Ls. 6-16 ("Q. Okay. Well, for what you're saying, if I'm understanding what you're saying then, that you feel the body was outside of the water for the first 12 hours? A. Well, at least it wasn't buoyant at all, and it certainly gets buoyant pretty quick. Doesn't take much water because that body had to be flat against the surface with all its weight and you can't do that in the water. **I've had other cases exactly like this where I have seen the same thing,**

8. A list of all cases in which Dr. Groben **testified** wherein broad ligature strangulation, drowning, or blunt force trauma was the cause, suspected cause, or explicitly excluded cause of death.

9. Reports and notes from all autopsies referenced in preceding request no. 7.

10. Any complaints filed against Dr. Groben and/or the Ada County Coroner with any agency or professional association regarding his/its professional performance, qualifications or veracity.

11. Scanned, accessible, high-resolution files of all photos of Ms. Henneman's body, including reenactment photographs. Petitioner currently is in possession of photographs on compact disk some of which will not open including CSI and BCPD photos.

12. Microscopic slides and reports, notes, or other documentation of "residual intact red blood cells" for the seven identified scalp injuries, and specific identification of the number of sections taken from each individual laceration and the results at each identified section.

13. Sex crimes kit protocol.

14. Any notes, reports, or results of tests in the Henneman case regarding the following:

    a. Reconstruction of ligatures
    b. Depth of the scalp wounds
    c. Fingernail clippings
    d. Pubic hair combings
    e. Head hair
    f. Blood sample (tube)
    g. The amount of force to break the humerous
    h. Any subcutaneous examination of the left and right wrists and left and right ankles as well as any other possible ligature sites (Petitioner is in possession of Dr. Groben's report at page 3 which

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and it just can't happen in the water."); p. 3989, L. 11 – p. 3990, L. 2 (Q. ...Did you conduct an examination of the skin underneath the ligature? Did you dissect that to perform medical tests to determine whether or not there was any hemorrhage present? A. Yes. Q. And did you locate any hemorrhage? A. No, I did not. Q. And is that a significant finding? A. Not with ligatures such as this. I've had many cases of broad --...**It's a broad ligature, and I have seen this many times in hangings and also other -- with self-strangulation.** And because it's so broad, the pressure is disbursed over a wide area.").) (emphasis added)

describes a subcutaneous examination of Ms. Henneman's right wrist and left arm only).

15. List of videos that Dr. Groben watched that, according to his testimony, demonstrated the length of time it takes a choking victim to be rendered unconscious. (Tr., p. 4036, 17 – p. 4037, L. 3.)

16. Forensic pathology procedural manual currently in effect as well as in effect in October 2000 for the Ada County Coroner's Office. (Tr., p. 4042, Ls. 9-11.)

17. All materials presented, including PowerPoint slides, used for the presentation given by Dr. Groben on the Henneman homicide at the northwest pathologist meeting held in September or October 2004.

18. All notes, reports and recordings made by or at the direction of the Coroner's Office or its agents regarding the death of Amanda Stroud.

19. All notes, reports and recordings made by or at the direction of the Coroner's Office or its agents regarding the death of Kay Lynn Jackson.

20. Documentation of all correspondence between Dr. Groben or Erwin Sonnenberg or their agents and other non-lay or expert witnesses or potential witnesses or their agents.

21. Dr. Groben's curriculum vita.

22. Dr. Groben's billing records or invoices for the instant case.

23. Any applications by the Ada County Coroner's office for accreditation with the National Association of Medical Examiners ("NAME"), or any other accrediting association, and any responses thereto.

O. **Dr. Michael Estess**. Dr. Estess interviewed Petitioner prior to trial. (R., p. 230; Tr., p. 2857.) The prosecutor and/or his agents interviewed Dr. Estess and listed him as a prospective State witness. Dr. Estess evaluated the testimony of Petitioner's experts at sentencing. After consultation with Dr. Estess, the prosecutor chose not to call him, choosing instead to undermine Petitioner's experts through closing argument. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Dr. Estess's files.

3. Any reports or summaries of oral communications made by Dr. Estess to the State in the instant case.

4. Documentation of all correspondence between Dr. Estess or his agents and other non-lay or expert witnesses or potential witnesses or their agents.

5. Dr. Estess' curriculum vita.

6. Dr. Estess' billing records or invoices for the instant case.

P. **Dr. Robert Engle**. The prosecutor listed Dr. Engle as a prospective State witness, although he did not testify. (R., p. 597, Tr., p. 2857.) Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. Dr. Engle's files.

3. Any reports or summaries of oral communications made by Dr. Estess to the State in the instant case.

4. Documentation of all correspondence between Dr. Engle or his agents and other non-lay or expert witnesses or potential witnesses or their agents.

5. Dr. Engle's billing records or invoices for the instant case.

Q. **Other Non-Lay or Expert Witnesses**.

1. All correspondence between non-lay or expert witnesses or their agents, including those witnesses listed in this section and/or the following persons:

   a. Kathryn Colombo
   b. Rachel Cutler
   c. Shawna Hilliard
   d. Jennifer Taylor

R. **Jean McCracken**. Ms. McCracken is Erick's mother. The prosecutor's investigator interviewed her. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

S. **Amanda Stroud**. Amanda Stroud was presumably critical in law enforcement's investigation and apparently conveyed hearsay statements attributed to Petitioner. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. All statements and summaries of statements prepared by law enforcement that were either made by or attributed to Ms. Stroud, regardless of medium, and all reports and notes made by law enforcement about Ms. Stroud. (Petitioner currently is in possession of an undated, unsigned report of interview of Amanda Stroud beginning with "She stated that she had been drunk...;" a letter from Amanda Stroud to Gregory Higgins dated 8/03; and the report of Det. Richard Allen dated 5/15/03, *see* Appendix B.)

3. All audio or video recordings, writings, or other mediums of communications made by Ms. Stroud and obtained by the prosecutor or law enforcement (Petitioner currently is in possession of the transcript of the 03/10/03 interview by Detectives Morgan and Smith, transcriber unknown, but does not have possession of the corresponding audio or video recording.)

4. All law enforcement and prosecution investigative reports, notes, and files regarding the Amanda Stroud homicide investigation.

T. **Kathy Stroud**. Kathy Stroud reported her suspicions that Erick Hall was involved in the Cheryl Hanlon homicide to law enforcement based on hearsay information apparently conveyed by her daughter. Petitioner requests the following discovery:

1. Prosecuting attorney documents.

2. All statements and summaries of statements to law enforcement either made by or attributed to Ms. Stroud, regardless of medium, and all reports and notes made by law enforcement about Ms. Stroud. (Petitioner currently is in possession of one incomplete, undated report of Det. Dave Smith, BCPD, *see* Appendix B.)

II. Prosecuting Attorney's Office

A. **Miscellaneous documentation**. Petitioner requests information regarding the following matters regardless of medium, including but not limited to notes, reports, memorandum, photographs, emails, and audio and/or video recordings (unless otherwise specified):

1. Color copies of any illustrative exhibits utilized during the State's opening statement.

2. A copy of the motion requesting an order impaneling the grand jury, and a copy of the order as required under ICR 6.1(b) and I.C. § 19-1307.

3. A copy of any committee minutes on the drafting of the death penalty jury instructions. (Tr., p. 4675, L. 25 – p. 4676, L. 4 (noting that both defense counsel and the prosecutor served on the death penalty instructions committee).)

4. Color copies of all PowerPoint slides and other documents shown to the jury, including, but not limited to the "scale" diagram roughly drawn and referenced in Mr. Hall's petition for post-conviction relief.

5. Access to the original video and/or audio tapes made during police custodial interrogation of Petitioner on 4/1/03 for the purpose of professional enhancement, and first part of interrogation (held in "Room A") on 3/13/03.

6. Disclosure and access to any other audio and/or video recordings involving Petitioner while in police custody and not previously disclosed during the underlying criminal proceedings. (Petitioner currently is in possession of videos of police interrogations conducted on 3/13/03, 3/29/03, and 4/1/03. *But see* above request III.A.5.)

7. All documented communications, or summaries of communications, by the prosecutor's office with the media, including but not limited to press releases.

B. **Discovery Materials**.

1. Documentation denoted by asterisk (*) as identified in comments section of attached Appendix B.

2. State's 1st, 3rd, 6th, 8th, 10th, 12th and 15th Addenda to Discovery Responses, and confirmation that the State's 16th Addenda to Discovery Response was the last discovery response sent to defense counsel.

C. **Electronic Mail**.

1. Copies of all e-mails between the Ada County Prosecuting Attorney's office and the Ada County Public Defender's office regarding the Henneman case, the Hanlon case, or Erick Hall.

III. Law Enforcement Agencies

A. **Field notes and logbooks.** Because police reports do not contain all information contained in original field notes and logbooks, Petitioner requests all field notes and logbooks generated by any law enforcement officer in the course of the investigation of the Henneman and Hanlon homicides.[6]

B. **Correspondence**. All correspondence or summaries of correspondence between law enforcement and other state and federal agencies regarding the Henneman homicide investigation.

C. **Specific reports**.

1. Reports prepared by "task force" members excluding those reports listed in Appendix B. The "task force" consisted of the following law enforcement personnel:

a. Special Agent Scott Mace, FBI
b. Det. Dave Smith, BCPD
c. Det. Lance Anderson, BCPD
d. Lt. Jim Maxon, BCPD
e. Officer Dan Barber, BCPD
f. Officer Mike Riley, BCPD
g. Officer Tom Schuler, BCPD
h. Officer Keven O'Rourke, BCPD
i. Det. Greg Morgan, BCPD
j. Det. Wade Spain, BCPD
k. Sgt. Mike Lusk, ISP (Boise)

[6] This request is duplicative of only those prior requests specifically identified in section II of this motion.

l. Sgt. Stewart Robinson, ISP (Twin Falls)
m. Det. Vicki Gooch, ISP (Boise)
n. Sgt. Dave Kynock, ISP (Boise)
o. Det. Joe Miller, Meridian Police
p. Det. Mike Taddicken, ACSD
q. Det. Jamie Barker, ACSD
r. Special Agent Scott Birch, Idaho Attorney General's Office
s. Det. Rick Allen, GCPD
t. Sgt. John Taylor, GCPD
u. Det. Cory Stambaugh, GCPD
v. Det. Steve Bartlett, GCPD

2. Other reports prepared by law enforcement personnel, whether or not officially "task force" members, (but excluding those reports listed in Appendix B):

a. Officer Sherri Cameron, BCPD
b. Officer Darla Curtis, GCPD
c. Off. Shawna Hilliard, BCPD
d. Officer Thomas Holst, BCPD
e. Officer Gary Wiggins, BCPD
f. Officer M. Furniss, GCPD

3. Other reports pertaining to search efforts including, but not limited to the following (but excluding those reports listed in Appendix B):

a. St. Alphonsus' Lifeflight searches
b. Access Air searches
c. Idaho Mountain Search and Rescue searches
d. Boise Fire Department dive team search
e. Ada County Paramedics four-wheeler search
f. Blood hound searches with Officer Tony Plott and Belle
g. Aerial search conducted by Mike Urizar and Lt. Walby
h. Boise River searches by Detectives Bartless and Babbitt

4. Other reports pertaining to recovery efforts including, but not limited to those prepared by the following individuals (but excluding those reports listed in Appendix B):

a. Captain Tony Lloyd, Boise Fire Department
b. Fireman Ton Galindo, Boise Fire Department
c. Fireman Doug Cooper, Boise Fire Department
d. Fireman Scott Hall, Boise Fire Department
e. Officer S. Cameron, Boise City Police Department
f. Det. Sergeant John Taylor, Garden City Police Department

D. **FBI I-drives**. Copies of all reports, communications or files contained on any I-Drive of any FBI field office involved in the Henneman or Hanlon investigation, including, but not limited to the Salt Lake City and Boise field offices.

E. **Task force lead assignments**. The task force received and investigated 527 leads that Petitioner believes were recorded on "lead sheets." Trial counsel files only contain twelve "lead sheets."

F. **Miscellaneous reports and other documentation**.

1. Police reports regarding all unsolved rapes, attempted rapes, murders and attempted murders that took place in Ada County from January 1995 to date.

2. Police reports regarding any and all attempted abductions taking place in or around the Greenbelt, from January 1995 to date, including, but not limited to the following unsolved homicides:

   a. Any and all law enforcement reports and notes regarding the murder of Kay Lynn Jackson.

3. Police reports regarding any and all attempted robberies involving beating on or around the head and taking place in Ada County from January 1995 to date. (Tr., p. 4887, Ls. 1-4 (April Sebastian testified that Petitioner told her that he sometimes hit unsuspecting persons over the head and stole their money).)

4. Any and all FBI reports containing "profiling" of the perpetrator in the Lynn Henneman and Cheryl Hanlon murders.

5. Any and all reports or documentation regarding the special light sources used, and where, when and by whom used.

6. Police reports regarding Petitioner's escape history.

7. Copy of all police reports and notes regarding Ada County Case No. M0303573, the Failing to Register as a Sex Offender case filed against Petitioner.

8. The name of the officer(s) who searched the Main Street Bridge area.

9. All documented communications, or summaries of communications, by law enforcement with the media, including but not limited to press releases.

10. Any reports identifying transients' involvement in small fires reported at East Jr. High.

11. Documentation regarding the search for bloodstains located at or near the Chart House parking lot and near the Main Street Bridge.

12. Records for Lynn Henneman's cellular telephone use from October 1, 2000 until service was terminated.

13. Any results from informal or formal testing conducted for time and distance to walk relevant areas of the Greenbelt, whether such testing was conducted by law enforcement personnel or others.

14. Any and all reports, notes and statements related to searches conducted along the Boise River between the DoubleTree Motel and the Capital Street Bridge, including searches of the Main Street bridge area on October 9, 2000. (Petitioner currently is in possession of report of Det. Cory Stambaugh, dated 5/18/01, *see* Appendix B).

15. Any and all reports, notes and statements related to searches conducted by the FBI Salt Lake City-based "Evidence Recovery Team" along the Boise River near the Main St. bridge area on or about 10/10/00, including documents relating to use of alternative light sources.

F. **Documentation regarding DNA evidence**.

1. Legible, readable, and unredacted miscellaneous documentation and other requested information identified in Appendix A and attached thereto.

2. All documentation relating to entry of Petitioner's DNA profile into the Idaho CODIS database, or any local or state database. (Tr., p. 3428.)

3. All documentation relating to entry of Petitioner's DNA profile into the national NDIS database, or any national database.

4. Copies of any reports and summaries of communications or conversations between Cellmark, Idaho State Police Forensics Laboratory, police agencies and/or the Ada County prosecutor's office regarding the existence and/or DNA profile for another perpetrator in the Henneman and/or Hanlon homicide cases.

5. Results of all comparisons made of Erick Virgil Hall's DNA profile against any local, state, or national DNA database, including the Idaho CODIS and national NDIS databases.

6. All DNA profile information developed or other forensic testing conducted in connection with the murder of Kay Lynn Jackson and information related to DNA or other forensic exclusions in that case.

7. All DNA profile information developed or other forensic testing conducted in connection with the death of Amanda Stroud and information related to DNA or other forensic exclusions in that case.

G. **All Documentation and Information Regarding Reward Money Offered For Assistance In The Henneman and Hanlon Homicide Investigations Including Claims Made On Such Reward**.

H. **Documentation Regarding Sex Offender Registration**.

1. Documentation from the Idaho sex offender registry involving registration, or attempts at registration, by Erick Hall.

V. Miscellaneous Documents and Reports.

A. Miscellaneous

1. Legible copy of all receipts from the Table Rock Brewhouse associated with food and alcohol ordered and purchased by Lynn Henneman on 09/24/00.

2. Transcripts of all grand jury proceedings held in connection with State v. Erick Virgil Hall, Ada County No. H0300614 (Hanlon).

3. Register of Actions for State v. Erick Virgil Hall, Ada County Case Nos. H0300614/M0302868 (Hanlon).

4. Copies of all exhibits presented to Grand Jury No. 03-35 (Lynn Henneman).

5. Copies of any and all written questions by jury to the court, any bailiff, or other court personnel. (Tr., p. 5516.)

VI. IMSI, Ada County Jail, Garden City Jail and Other Prison and Jail Records

A. Inmate Classification Manuals. Any and all manuals, informal or formal policies, memoranda or guidelines for inmate placement, initial classification,

reclassification, custody status and risk assessment for Idaho Department of Corrections that were in use in March, 2004. (*See* Tr., pp. 4903-4951 (testimony of Dennis Dean, Inmate Records Placement Manager, IDOC).)

B. Safety Practices Manual. Any and all manuals, informal or formal policies, memoranda or guidelines regarding safety practices for female correctional officers or other female employees or volunteers and inmates classified as or believed to be sexually violent toward women.

VII. Depositions and Related Documentation Requiring Subpoenas

A. All members of the defense team and their agents. Petitioner moves to depose Amil Myshin (lead counsel), D.C. Carr (second chair counsel), Glenn Elam (investigator), Rosanne Dapsauski (mitigation specialist), and Rolf Kehne (jury selection consultant). Petitioner further moves for subpoenas duces tecum, as specified below. Due to trial counsels' respective schedules, the standard of performance in post-conviction cases, and trial counsels' preference, Petitioner requests that this Court issue subpoenas for the attendance of each team member for the purpose of independent depositions.

Petitioner further moves for a subpoenas decus tecum for each of the above depositions, to include the following:

1. Documentation identifying the cases each trial team member worked on from April 1, 2003 through January18, 2005. (Tr., p. 215, L. 24 – p. 216, L.2 (noting lead counsel's heavy workload including a manslaughter trial scheduled for April 2004.)

2. All e-mail correspondence between trial team members and the prosecutor's office. (Tr., p. 249, Ls. 8-14.)

B. Dr. Michael Estess

VIII. Documents Requiring Subpoenas

A. Miscellaneous

1. All files created by or held by the Ada County Public Defender's office related to State v. Erick Virgil Hall, Case No. M0302158/H0300423 (failure to register).

2. An identification of the names of all cases that each trial counsel handled while representing Petitioner including the case names and dates that any of the cases went to trial, including an identification of cases involving serious felony offenses of arson, homicide (all degrees), rape, sodomy, kidnapping, burglary and robbery.

3. All Washington DSHS Division of Child Support records pertaining to Frank McCracken and Jean McCracken/Hall in Case No. 70253. Court Order to specify that need for records outweighs need for privacy.

IX. Preservation of Physical Evidence. Petitioner requests that all physical evidence collected in the underlying criminal investigation be preserved in order to avoid the destruction of potentially exculpatory materials. *See Arizona v. Youngblood*, 488 U.S. 51 (1988)(bad faith destruction of potentially useful evidence may violate due process).

X. Access to Hanlon Court Documents. SAPD counsel was informed by court personnel that permission from both the Hanlon defense team and the prosecutor's office was necessary to gain access to the Hanlon court file/record. However, trial counsel on the Hanlon case subsequently informed SAPD that they knew nothing of this. SAPD access is necessary because the Hanlon case played an extremely important role in the pretrial and trial proceedings in the Henneman case. Regardless of whether evidence from the Hanlon case was ever admitted, the threat of its admission clearly influenced trial counsels' preparations and the outcome of the proceedings.

DATED this 5th day January, 2006.

MARK J. ACKLEY
Lead Counsel, Capital Litigation Unit

PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

APPENDIX A

The following is a list of illegible, redacted, unreadable, or otherwise incomplete documentation and imaging relating to DNA testing within the possession of the SAPD, obtained through review of trial counsels' files.

1. Photo documentation dated 11/2/00, SAPD #8286.
2. ISP Lab Notes dated 10/2000, SAPD #9714.
3. ISP Lab Notes dated 10/2000, SAPD #9715.
4. ISP Lab Notes dated 10/2000, SAPD #9711.
5. Handwritten notes dated 10/2000 through 4/2003, SAPD #8280.
6. Identity of "KAG" who initialed handwritten notes dated 10/2000 through 4/2003, SAPD #8280.
7. ISP State Lab DNA Report by Ann Bradley dated 11/03/00, SAPD #8585.
8. ISP State Lab DNA Report by Ann Bradley dated 11/03/00, SAPD #8587.
9. Report or notes written by Ann Bradley, dated 11/13/00, Petitioner currently is in possession of one page only, SAPD #8594.
10. Missing page 29 of Ann Bradley's reported dated 12/18/00, SAPD #8645.
11. Organic Extraction Worksheet dated 10/18/00, SAPD #8580.
12. Polaroid photograph of Chilex Hair Extraction dated 11/28/00, SAPD #8359.
13. Identity of witness to Chelex Extraction of DNA dated 11/9/00, SAPD #8302.
14. PCR Printed Results dated 11/11/00, SAPD #8320.
15. DQA1 Typing Image, SAPD #8614.
16. Identity of analyst who initialed ISP DQA1 2nd Reader Form, dated 10/23/00.
17. DQA1 Typing Image dated 12/12/00, SAPD #8634.

18. DQA1 Typing Images dated 12/20/00, SAPD #8655.

19. DQA1 Typing Image dated 12/29/00, SAPD #8681.

20. DQA1 Typing Image dated 1/10/01, SAPD #8706.

21. DQA1 Typing Image dated 2/9/01, SAPD #8729.

22. DQA1 Typing Image dated 3/23/01, SAPD #8755.

23. DQA1 Typing Image dated 5/10/01, SAPD #8803.

24. DQA1 2nd Reader Form dated 12/20/00, SAPD #8660.

25. Identity of "PM" who initialed 2nd Reader Form," dated 12/01/00, SAPD #8619.

26. Identities of "PM" and "C" who initialed DQA1 2nd Reader Form dated 12/20/00, SAPD #8660.

27. Identity of analyst on "DQA1 2nd Reader Form," dated 12/20/00, SAPD #8662.

28. Product Gel Sheet dated 3/25/03, SAPD #8262.

29. Product Gel Sheet dated 11/7/00, SAPD #8290.

30. Product Gel Sheet dated 11/10/00, SAPD #8306.

31. Product Gel Sheet dated 11/10/00, SAPD #8318.

32. Product Gel Sheet dated 11/16/00, SAPD #8343.

33. Product Gel Sheet dated 12/2/00, SAPD #8368.

34. PCR Product Gel Image dated 11/30/00, SAPD #8610.

35. PCR Product Gel Image dated 11/30/00, SAPD #8611.

36. PCR Product Gel Image dated 11/30/00, SAPD #8612.

37. PCR Product Gel Image dated 12/12/00, SAPD #8630.

38. PCR Product Gel Image dated 12/12/00, SAPD #8632.

39. PCR Product Gel Image dated 12/20/00, SAPD #8651.

40. PCR Product Gel Image dated 12/20/00, SAPD #8653.

41. PCR Product Gel Image and date of image, SAPD #8677.

42. PCR Product Gel Image dated 12/29/00, SAPD #8679.

43. PCR Product Gel Image dated 1/10/01, SAPD #8702.

44. PCR Product Gel Image dated 1/10/01, SAPD #8704.

45. PCR Product Gel Image dated 2/9/01, SAPD #8725.

46. PCR Product Gel Image dated 2/9/01, SAPD #8727.

47. PCR Product Gel Image dated 3/23/01, SAPD #8753

48. PCR Product Gel Image dated 4/23/01, SAPD #8774.

49. PCR Product Gel Image dated 4/23/01, SAPD #8776.

50. PCR Product Gel Image dated 4/23/01, SAPD #8778.

51. PCR Product Gel Image dated 5/10/01. *See* Appendix C, SAPD #8799.

52. PCR Product Gel Image dated 5/10/01, SAPD #8801.

53. PCR Product Gel Image dated 6/8/01, SAPD #8821.

54. PCR Product Gel Image dated 6/8/01, SAPD #8823.

55. Polymarker Typing Image, SAPD #8617.

56. Polymarker Typing Image dated 12/20/00, SAPD #8657.

57. Polymarker Typing Image dated 12/29/00, SAPD #8683.

58. Polymarker Typing Image dated 12/29/00, SAPD #8685.

59. Polymarker Typing Image dated 1/10/01, SAPD #8708.

60. Polymarker Typing Image dated 2/9/01, SAPD #8731.

61. Polymarker Typing Image dated 3/23/01, SAPD #8757.

62. Quantiblot Image dated 12/11/00, SAPD #8625.

63. Quantiblot Image dated 11/29/00, SAPD #8605.

64. Quantiblot Image dated 12/19/00, SAPD #8647.

65. Quantiblot Image dated 12/28/00, SAPD #8673.

66. Quantiblot Image dated 1/9/01, SAPD #8698.

67. Quantiblot Image dated 2/7/01, SAPD #8720(b).

68. Slot Blot Loading Sheet results dated 03/24/03 (possibly called a "membrane"), SAPD #8259.

69. Slot Blot Loading Sheet results dated 11/03/00, SAPD #8287.

70. Slot Blot Loading Sheet results dated 11/09/00, SAPD #8303.

71. Slot Blot Loading Sheet results dated 11/13/00, SAPD #8340.

72. Slot Blot Loading Sheet results dated 11/29/00, SAPD #8361.

73. Slot Blot Loading Sheet results dated 11/30/00, SAPD #8363.

74. Identity of "JF" who initialed "DNA Standards" on LTI Slot Blot Loading Sheet dated 11/30/00, SAPD #8364.

75. Slot Blot Loading Sheet results dated 12/01/00, SAPD #8365.

76. Identity of "EJH" who initialed Slot Blot Loading Sheet test dated 3/24/03, SAPD #8260.

77. Identity of "MAT" who initialed "Ladder & Sample Tray Witness" run information, SAPD #8263.

78. Identities of "JU" and "MNK" who initialed "Administrative Review Complete" and "Report Mailed & Invoiced" on Forensic Case Review Checklist, dated 3/2003, SAPD #8267.

79. Identity of "POY" who initialed "Administrative Review Complete" on Forensic Case Review Checklist dated 12/2000, SAPD #8268.

80. Identity of "KAB" who initialed shipping label from Cellmark to ISP, dated 2/2001, SAPD #8276.

81. Identity of witness (es) to "Section of DNA from Mixed Stains PCR," dated 11/2/00, SAPD #8285.

82. Identity of "CK" who initialed "Sample Order & Dilution" of Amplification dated 11/06/00, SAPD #8289.

83. Identity of "JAH" who initialed "Sample Order & Dilution Witness" of Amplification dated 11/9/00, SAPD #8305.

84. Identity of "WM" who initialed "Sample Order & Dilution Witness" of Amplification dated 11/10/00, SAPD #8316.

85. Identity of all witnesses, including identity of witness with initials "SB" or possibly "RB," to Microcon 100 Filtration Concentration, SAPD #8339.

86. Identities of "LLG" and "JU" who initialed "Ladder & Dilution Control Witness" and "Allelic Ladder Check" on Run Information dated 11/16/00, SAPD #8344.

87. Identity of "K?D" who initialed "Sample Prep" of AmpFISTR Profiler Plus/COfiler 310 Sample Prep Sheet, SAPD #8345.

88. Identity of "XX" who initialed "Ladder Witness" on Run Information dated 12/2/00, SAPD #8369.

89. Identity of individuals not disclosed on document regarding 3 sets of swabs, from John Brumbaugh (GCPD) to Jenny Treinen (ISP), dated 10/31/00, SAPD #8555.

90. Identity of donor of oral mouth swabs contained in unidentified evidence envelope, from Darla Curtis (GCPD) to Jenny Treinen (ISP), dated 11/2/00, SAPD #8556.

91. Identity of reviewer initials on "Blind Internal Quality Control Sample" (Bloodstain), dated 11/28/00, SAPD #8621.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of January, 2006, a true and correct copy of the foregoing document, MOTION FOR DISCOVERY, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	X U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile X Hand Delivery ____ E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE, ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile X Hand Delivery ____ E-Mail

Brandi Reed

BRANDI REED
Administrative Assistant

MJA/br

See Appendix A and B found on *Certificate of Exhibits*, Under *Exhibits* # 1.

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, vs. STATE OF IDAHO, Respondent,	**Case No. SPOT0500155** **STATE'S OBJECTION TO THE MOTION FOR DISCOVERY**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, representing the State of Idaho, in the above entitled matter, and puts before the Court the State's Objection to the Petitioner's Motion for Discovery which was filed on about January 5, 2006. The State will more thoroughly address the issues in a later memorandum, but objects on the basis that the approximate 350 discovery requests in the Petitioner's Motion are a precluded "fishing expedition" as described in Aeschliman vs. State, 132 Idaho 397 (Ct. App. 1999). The State requests that the Court exercise it's discretion and not order discovery until the Petitioner

shows that each item of discovery is necessary to protect the petitioner's substantial rights. Aechliman, supra; State v. LePage 138 Idaho 803 (Ct. App. 2003).

RESPECTFULLY SUBMITTED this 14th day of January 2006.

GREG H. BOWER
Ada County Prosecutor

Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of January 2006, a true and correct copy of the foregoing State's Objection to Motion for Discovery was served to **Mark J. Ackley and Paula M. Swensen, Deputy State Appellate Public Defenders, 3647 Lake Harbor Lane, Boise, Idaho 83703** in the manner noted below:

- ☑ By depositing copies of the same in the United States mail, postage prepaid, first class.
- ☐ By depositing copies of the same in the Interdepartmental Mail.
- ☐ By informing the office of said individual(s) that said copies were available for pickup at the Office of the Ada County Prosecutor.
- ☐ By faxing copies of the same to said attorney(s) at the facsimile number:

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. SPOT0500155

MOTION TO RECONSIDER ORAL ORDERS RE: *EX PARTE* PROCEDURES FOR EXPERT ACCESS AND RESTRICTIONS ON JUROR CONTACT

(CAPITAL CASE)

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys, the State Appellate Public Defender's Office, and moves this Honorable Court to reconsider oral Orders made during the telephonic hearing held on January 6, 2006, wherein the Court denied Petitioner's oral motion for the Court to adopt *ex parte* procedures for facilitating expert access to Petitioner and wherein the Court placed restrictions on counsels' abilities to contact jurors in the underlying capital trial.

This motion is made pursuant to I.C. § 19-2719, I.C. §§ 19-4901, et seq., I.C.R. 57, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, corresponding sections of the Idaho Constitution, all matters of record in the

underlying criminal case, and the Memorandum in Support with accompanying attachments filed herewith.

Dated this 20th day of January, 2006.

Paula M. Swenson for Mark J. Ackley
MARK J. ACKLEY
Deputy, State Appellate Public Defender

Paula M. Swensen
PAULA M. SWENSEN
Deputy, State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 24th day of January, 2006, served a true and correct copy of the forgoing MOTION TO RECONSIDER ORAL ORDERS RE: *EX PARTE* PROCEDURES FOR EXPERT ACCESS AND RESTRICTIONS ON JUROR CONTACT as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	_____ Statehouse Mail _____ U.S. Mail _____ Facsimile __✓__ Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	__✓__ Statehouse Mail _____ U.S. Mail _____ Facsimile _____ Hand Delivery

Brandi Reed

BRANDI REED
Administrative Assistant

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

CASE NO. SPOT0500155

MOTION FOR THE COURT TO ADOPT PETITIONER'S PROPOSED SCHEDULING ORDER

(CAPITAL CASE)

ORIGINAL

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his counsel at the State Appellate Public Defender, and moves this Court adopt Petitioner's proposed scheduling order for the remainder of these post-conviction proceedings. Petitioner's motion is based on I.C. §§ 19-2719, 19-4901, et seq., the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding sections of the Idaho Constitution.

The following scheduling proposal is based on a series of triggering events to ensure the timely and meaningful resolution of these capital post-conviction proceedings. To ensure meaningful post-conviction proceedings, a scheduling order must provide post-conviction counsel the opportunity to satisfy their ethical and legal obligations to investigate and raise all claims that are arguably meritorious under the standards

applicable to high quality capital defense representation. ABA Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases (2003) (hereinafter "ABA Guidelines"), Guidelines 10.15.1.C ("[p]ost-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedure rules" and "make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review"), 10.15.1.E.4 ("[p]ost-conviction counsel should . . . continue an aggressive investigation of all aspects of the case"); *see also State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992)(recognizing that without meaningful post-conviction proceedings a capital petitioner might be denied due process of law under the federal and state constitutions).

Because of the extensive nature of counsels' investigation, including discovery requests and depositions, Petitioner proposes that utilizing time lines as "triggering events" will be more efficient than specifying calendar dates, precluding the need for any unnecessary litigation. Petitioner proposes the following triggering events for deadlines:

1. DISCOVERY

   a. A timeline for the State to respond to any court-ordered discovery and for Petitioner to review and assess such responses. The amount of time necessary for the State to respond to discovery depends in large part upon the degree to which this Court grants Petitioner's discovery requests. Petitioner's Motion for Discovery is currently pending; a hearing date on the motion has yet to be scheduled. The discovery

motion is a necessary part of counsels' independent and thorough investigation required by performance standards for capital post-conviction counsel for the purpose of identifying and raising all arguably meritorious claims in a final amended petition for post-conviction relief. ABA Guidelines 10.15.1.C, 10.15.1.E.4. Petitioner should be given a reasonable time to review the discovery and assess necessary investigative follow-up prior to filing an amended petition.

2. TRANSCRIPTS

a. The date Petitioner receives the transcript of the exercise of peremptory challenges. Preparation of the transcript has been ordered, but a transcript has not yet been completed by the court reporter or received by Petitioner. *Hoffman v. Arave,* 236 F.3d 523, 535 (9th Cir. 2001)(recognizing that claims of ineffective assistance of counsel require review of the entire trial transcript)

b. The date Petitioner receives the transcript of the interrogation tapes as played to the jury. Preparation of the transcript has been ordered, but a transcript has not yet been completed or received by Petitioner. *See Hoffman v. Arave, supra.*

3. DEPOSITIONS

a. A timeline for the completion of depositions. After receipt of the transcripts ***and*** all court-ordered discovery, whichever occurs latest, and a reasonable time period in which to review those materials, Petitioner proposes that the Court should adopt a time-line for the

taking of depositions. The transcripts of the depositions will be attached to an amended petition for post-conviction relief. I.C. § 19-4903.

4. AMENDED PETITION FOR POST-CONVICTION RELIEF

   a. Petitioner requests a reasonable time following receipt of the deposition transcripts for the filing of his amended petition. I.C. § 19-4906(a).

5. DISPOSITIVE MOTIONS AND RESPONSIVE PLEADINGS

   a. Upon the filing of an amended petition, the Court should enter a scheduling order for the filing of dispositive motions. I.C. § 19-4906(c).

   b. The scheduling order should include a reasonable time to respond to any dispositive motion filed.

In conclusion, an efficient, meaningful, and realistic timeline for the final resolution of these capital post-conviction proceedings flows from the aforementioned series of triggering events that are part and parcel to all post-conviction proceedings and required by the standards governing counsels' performance. Accordingly, Petitioner respectfully moves this Court to enter a scheduling order taking into consideration these events.

Dated this 23rd day of January, 2006.

Paula M Swensen for Mark J. Ackley
MARK J. ACKLEY
Deputy, State Appellate Public Defender

Paula M. Swensen
PAULA M. SWENSEN
Deputy, State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 23rd day of January, 2006, served a true and correct copy of the forgoing MOTION FOR THE COURT TO ADOPT PETITIONER'S SCHEDULING ORDER as indicated below:

ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ Statehouse Mail ____ U.S. Mail ____ Facsimile __X__ Hand Delivery
ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	__X__ Statehouse Mail ____ U.S. Mail ____ Facsimile ____ Hand Delivery

Guadalupe Ayala
GUADALUPE AYALA
Mitigation Specialist

Session: Neville012406 Division: DC Courtroom: CR503
Session Date: 2006/01/24 Session Time: 09:18
Judge: Neville, Thomas F.
Reporter: French, Janet

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK
Plaintiff Attorney: ACKLEY, MARK
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2006/01/24
13:50:57 - Operator
Recording:
13:50:57 - New case
, STATE OF IDAHO
13:51:18 - Operator
Stop recording:
13:51:29 - Operator
Recording:
13:51:29 - Record
, STATE OF IDAHO
13:51:30 - Judge: Neville, Thomas F.
The Court called the case.
13:52:01 - Other: SWENSON, PAULA
Here on behalf of petitioner as well
13:53:20 - Judge: Neville, Thomas F.

The Court stated that at last meeting, the Court and counsel met in chambers,
13:54:06 - Judge: Neville, Thomas F.
Mr. Ackley by telephone. Court and counsel discussed the jury questionnaire.
13:56:40 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated that he has made multiple revisions to the previous order
13:57:32 - Plaintiff Attorney: ACKLEY, MARK
emiled to the Court.
13:57:47 - State Attorney: BOURNE, ROGER
Mr. Bourne stated new order provided is acceptable to the State
13:58:04 - Judge: Neville, Thomas F.
Court views off the record
13:58:12 - Operator
Stop recording:
14:00:58 - Operator
Recording:
14:00:58 - Record
, STATE OF IDAHO
14:01:04 - Judge: Neville, Thomas F.
The Court responded
14:03:29 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded regarding reconsidering, want unredacted form
14:10:42 - Judge: Neville, Thomas F.
The Court will set this matter for hearing on February 2, 2006 @ 9:00 a.m.
14:11:17 - State Attorney: BOURNE, ROGER
Mr. Bourne stated motion has 336 requests for Discovery with several
14:11:44 - State Attorney: BOURNE, ROGER
sub-parts that could take it into the 1000's
14:17:16 - Judge: Neville, Thomas F.
The Court stated may need to start the hearing regarding discovery on the
14:17:39 - Judge: Neville, Thomas F.
aftenoon.
14:17:44 - State Attorney: BOURNE, ROGER
Mr. Bourne stated counsel were discussing discovery before coming in today.
14:18:04 - State Attorney: BOURNE, ROGER
Mr. Ackley trying to prepare a list of what might be agreed to. Will need
14:18:49 - State Attorney: BOURNE, ROGER
more time to address that motion
14:19:08 - Plaintiff Attorney: ACKLEY, MARK

Mr. Ackley stated everything requested is needed.
14:21:28 - Judge: Neville, Thomas F.
The Court could hold a telephonic hearing on Friday, Februar
y 3 @ 4:30 p.m.
14:21:46 - Judge: Neville, Thomas F.
and advise whether the civil trial had gone down and may be
able to hear the
14:22:18 - Judge: Neville, Thomas F.
motions the week of February 7th.
14:23:20 - Operator
Stop recording:
14:23:42 - Operator
Recording:
14:23:42 - Record
, STATE OF IDAHO
14:23:44 - Judge: Neville, Thomas F.
The Court will look at February 8th, to set the hearing
14:24:26 - Operator
Stop recording:

Session: Neville020306 Division: DC Courtroom: CR501
Session Date: 2006/02/03 Session Time: 08:45
Judge: Neville, Thomas F.
Reporter: French, Janet

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0013
Case Number: SPOT0500155D
Plaintiff:
Plaintiff Attorney: Swenson, Paula
Defendant: Idaho, State of
Co-Defendant(s):
Pers. Attorney:
State Attorney: Bourne, Roger
Public Defender:

2006/02/03
17:09:41 - Operator
Recording:
17:09:41 - New case
Idaho, State of
17:10:36 - Judge: Neville, Thomas F.
Court here for further proceedings. Court inquired if form of order agreed
17:11:23 - Judge: Neville, Thomas F.
on access to jury questionnaire.
17:11:54 - Plaintiff Attorney: Swenson, Paula
Ms. Swenson stated that the Court was going to here a Motion to Reconsider.
17:19:03 - Judge: Neville, Thomas F.
Court sets over to February 8, 2006 @ 1:15 p.m.
17:19:21 - Operator
Stop Recording

Filed Wednesday, February 08, 2006 at 01:39 PM
J. DAVID NAVARRO, CLERK OF THE COURT
BY: _____ Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, PLAINTIFF Plaintiff(s) VS STATE OF IDAHO, DEFENDANT Defendant(s)	CASE NO. SP-OT-05-00155D NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Motion Wednesday, February 15, 2006 at 02:00 PM
Judge: Thomas Neville
Courtroom:

I certify that copies of this Notice were served as follows on Wednesday, February 08, 2006.

Petitioner: **MARK ACKLEY**
STATE APPELLATE PUBLIC DEFENDER
VIA EMAIL

Mailed_____ Hand Delivered_____ Faxed_____

State's Counsel: **ROGER BOURNE**
VIA EMAIL

Mailed_____ Hand Delivered_____ Faxed_____

Dated: Wednesday, February 08, 2006

J. DAVID NAVARRO
Clerk of the Court

By: _____
Deputy Clerk

Session: Neville011506 Division: DC Courtroom: CR501
Session Date: 2006/02/15 Session Time: 08:40
Judge: Neville, Thomas F.
Reporter: French, Janet

Clerk(s):
Ellis, Janet

State Attorneys:
Owen, Patrick

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0018
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK VIRGIL
Plaintiff Attorney: ACKLEY, MARK
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2006/02/15
14:31:17 - Operator
Recording:
14:31:17 - New case
, STATE OF IDAHO
14:31:54 - Other: SWENSON, PAULA
here on behalf of the petitioner as well
14:32:08 - Judge: Neville, Thomas F.
The Court here on Petitioner's Motion to Reconsider oral ord
ers
14:32:32 - Judge: Neville, Thomas F.
The Court has not entered written orders on this matter, thi
s matter resulted
14:33:47 - Judge: Neville, Thomas F.
from telephone conference.

14:34:33 - Judge: Neville, Thomas F.
The Court not aware of written motions, but had questions po sed by Mr.
14:34:54 - Judge: Neville, Thomas F.
Ackley.
14:38:04 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded regarding January 6, date
14:42:28 - State Attorney: BOURNE, ROGER
Mr. Bourne responded,regarding exparte contact, believe shou ld not do that
14:47:02 - Other: SWENSON, PAULA
Ms. Swenson argued motion, stated got a copy of visiting req uirements for
14:49:05 - Other: SWENSON, PAULA
Court appointed experts, would like this as part of the reco rd, conts argumen
14:53:26 - Other: SWENSON, PAULA
to allow exparte motions for expert access
14:53:38 - State Attorney: BOURNE, ROGER
Mr. Bourne responded
14:56:07 - Other: SWENSON, PAULA
Ms. Swenson responded
14:57:22 - Judge: Neville, Thomas F.
The Court tentatively inclined to deny a uniform procedure f or ex parte for
14:59:57 - Judge: Neville, Thomas F.
experts in every case. Court would like to review on a case by case
15:00:09 - Judge: Neville, Thomas F.
situation.
15:01:44 - Other: SWENSON, PAULA
Court is asking to see each one on a case by case situtation
15:02:23 - Judge: Neville, Thomas F.
Court will consider each motion on its own merits. Court go es to the second
15:02:37 - Judge: Neville, Thomas F.
piece, Motion for access to prior jurors
15:03:08 - Other: SWENSON, PAULA
Ms. Swenson makes argument
15:06:27 - Judge: Neville, Thomas F.
Would have to have a basis for mis-conduct by the jury
15:06:41 - Other: SWENSON, PAULA
Would need to interview to find out if there was possible mi s-conduct
15:07:52 - State Attorney: BOURNE, ROGER
Mr. Bourne responded
15:11:14 - Judge: Neville, Thomas F.
The Court responded, regarding prior experiences with privat

e investigators
15:13:44 - Judge: Neville, Thomas F.
who went too far
15:14:36 - Other: SWENSON, PAULA
Ms. Swenson responded
15:16:41 - Judge: Neville, Thomas F.
The Court not going to deny access to jury, but must have pr ior permission
15:17:06 - Judge: Neville, Thomas F.
from the Court and not ex parte, would need notice to the St ate
15:19:36 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley cont'd to Motion to Reconsider jury questionnaire s standby
15:20:27 - Plaintiff Attorney: ACKLEY, MARK
request for unredacted questionnaires, but believe could red act addresses
15:22:15 - Plaintiff Attorney: ACKLEY, MARK
Could redact those portions before showing to Mr. Hall
15:22:32 - State Attorney: BOURNE, ROGER
Mr. Bourne responded
15:23:49 - State Attorney: BOURNE, ROGER
Look at group of jurors in two groups, those that were all q uestioned and
15:24:09 - State Attorney: BOURNE, ROGER
those released by stip and then those that sat on jury panel and the three
15:24:22 - State Attorney: BOURNE, ROGER
alternates
15:26:35 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded, would review questionnaires, stated Ab dullah was given
15:29:21 - Plaintiff Attorney: ACKLEY, MARK
unredacted questionnaires
15:30:35 - State Attorney: BOURNE, ROGER
Each juror looked at defendant and stated they did not know defendant,
15:31:28 - State Attorney: BOURNE, ROGER
likewise defendant could have stated whether he knew any of the jurors.
15:31:52 - Judge: Neville, Thomas F.
Court indicated that was true.
15:32:45 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated not hiding identity is in the transcript. He would be able
15:33:40 - Plaintiff Attorney: ACKLEY, MARK
to cross reference their number on questionnaire.
15:36:01 - Judge: Neville, Thomas F.

Court believes counsel can do their job with the transcript and
15:36:38 - Judge: Neville, Thomas F.
questionnaires side by side as redacted. Court will consid er motions to
15:36:57 - Judge: Neville, Thomas F.
approach the jury on a case by case
15:37:23 - Plaintiff Attorney: ACKLEY, MARK
Response
15:41:40 - Operator
Stop recording:
15:45:04 - Operator
Recording:
15:45:04 - Record
, STATE OF IDAHO
15:45:06 - Judge: Neville, Thomas F.
The Court can set the hearing Thursday, March 2 @ 1:30 p.m. Would request
15:45:29 - Judge: Neville, Thomas F.
counsel try to narrow the scope of the hearing. Request Mr. Ackley prepare
15:45:53 - Judge: Neville, Thomas F.
forms of orders based on today's motions and provide to Stat e copy to view
15:46:18 - Judge: Neville, Thomas F.
for form
15:46:24 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated Discovery motion is quite lenghty and divi ded betwwen Ms.
15:46:48 - Plaintiff Attorney: ACKLEY, MARK
Swenson and Mr. Ackley.
15:46:58 - State Attorney: BOURNE, ROGER
no objection
15:47:03 - Judge: Neville, Thomas F.
Will be in recess
15:47:10 - Operator
Stop recording:

Session: Neville030206 Division: DC Courtroom: CR501
Session Date: 2006/03/02 Session Time: 13:24
Judge: Neville, Thomas F.
Reporter: French, Janet

Clerk(s):
Ellis, Janet

State Attorneys:

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001
Case Number: SPOT0500155D
Plaintiff: HALL, ERICK VIRGIL
Plaintiff Attorney: ACKLEY, MARK
Defendant: STATE OF IDAHO
Co-Defendant(s):
Pers. Attorney:
State Attorney: BOURNE, ROGER
Public Defender:

2006/03/02
13:51:40 - Operator
Recording:
13:51:40 - New case
, STATE OF IDAHO
13:52:00 - Other: SWENSON, PAULA
here on behalf of petitioner Erick Hall as well.
13:52:37 - Judge: Neville, Thomas F.
Court has had provided a couple of orders provided, inquired if Mr. Bourne
13:52:57 - Judge: Neville, Thomas F.
had any objection to form of the order
13:53:29 - State Attorney: BOURNE, ROGER
Mr. Bourne stated he has viewed one order but not the other.
13:54:08 - Judge: Neville, Thomas F.
Court also in receipt of State's objection, inquires of agre

ement reached
13:54:22 - Judge: Neville, Thomas F.
between counsel in continuing this matter to another day
13:54:37 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated have 40 categories that will be requesting discovery on,
13:55:06 - Plaintiff Attorney: ACKLEY, MARK
only two of those would the State not object too. Mr. Ackley requested to
13:55:23 - Plaintiff Attorney: ACKLEY, MARK
amend the petition and then come back on further hearing.
13:56:43 - State Attorney: BOURNE, ROGER
Mr. Bourne concurred, State of Law is that motion for Discovery has to be
13:57:01 - State Attorney: BOURNE, ROGER
connected to the Petition. State's view is there is no apparent connection
13:57:18 - State Attorney: BOURNE, ROGER
between the petition now filed and the request for discovery. Assumed there
13:57:44 - State Attorney: BOURNE, ROGER
would be an amended petition at some point. Don't know that there would be
13:59:22 - State Attorney: BOURNE, ROGER
further amendments after that.
13:59:30 - Judge: Neville, Thomas F.
Court inquires how long to file amended petition.
14:00:19 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley indicated if this was a petition just for purposes of Discovery or
14:01:03 - Plaintiff Attorney: ACKLEY, MARK
if this is final petition for summary disposition. Believe can have done in
14:01:32 - Plaintiff Attorney: ACKLEY, MARK
4-6 weeks if for purpose of discovery.
14:03:08 - State Attorney: BOURNE, ROGER
Mr. Bourne responded. Would like a serious petition to litigate.
14:04:55 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated not prepared to file a final petition yet, purpose of
14:05:36 - Plaintiff Attorney: ACKLEY, MARK
conversation yet was to get discovery done. Would take 4-6 weeks to file
14:07:19 - Plaintiff Attorney: ACKLEY, MARK
amended petition aimed at discovery.
14:07:52 - Judge: Neville, Thomas F.
The Court has discretion allow amended pleadings. Partial a

greement to
14:08:17 - Judge: Neville, Thomas F.
vacate hearing today on discovery to get a more focused hear ing. Court will
14:09:56 - Judge: Neville, Thomas F.
request that amended petition by April 17th. The Court will not rule on
14:10:38 - Judge: Neville, Thomas F.
whether this is the first amended or last amended. Court wi ll reserve
14:10:54 - Judge: Neville, Thomas F.
judgment, as far as response from the State
14:12:31 - State Attorney: BOURNE, ROGER
Mr. Bourne requested mid may
14:12:42 - Judge: Neville, Thomas F.
Court will order be completed by May 19th.
14:14:42 - Plaintiff Attorney: ACKLEY, MARK
Need to know if the Court is going to allow another amended petition.
14:15:29 - Judge: Neville, Thomas F.
Court can't rule in advance in abcense of pleadings before t he Court
14:16:33 - Plaintiff Attorney: ACKLEY, MARK
Request further clarification
14:16:44 - Judge: Neville, Thomas F.
Court can't rule in the blind, not knowing whether or not co unsel discover
14:17:23 - Judge: Neville, Thomas F.
anything further
14:17:27 - Plaintiff Attorney: ACKLEY, MARK
14:17:34 - Judge: Neville, Thomas F.
Need to have this narrowed down at some point. Court loathe to rule in the
14:18:24 - Judge: Neville, Thomas F.
dark.
14:21:42 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley stated need some assurance from the State.
14:22:18 - Judge: Neville, Thomas F.
Amended complaint is bound to be beneficial for judicial eco nomy.
14:23:28 - State Attorney: BOURNE, ROGER
Mr. Bourne had agreed to set this over to get amended petit ion
14:24:33 - Plaintiff Attorney: ACKLEY, MARK
Mr. Ackley responded. Would like to proceed on some of the discovery issues
14:26:58 - Plaintiff Attorney: ACKLEY, MARK
today. Got a wholesale objection from the State

14:27:20 - Judge: Neville, Thomas F.
Court does not have ability to hear today. Court will set f urther deadline
14:27:50 - Judge: Neville, Thomas F.
for possible amendment to the Motion for Discovery by June 9 th. The Court
14:29:04 - Judge: Neville, Thomas F.
will set this hearing for June 23 @ 9:00 a.m. for hearing on the motion re:
14:29:19 - Judge: Neville, Thomas F.
Discovery. Request State advise the Court if any objection to the forms of
14:30:30 - Judge: Neville, Thomas F.
the order
14:30:48 - Judge: Neville, Thomas F.
The Court has been making emails part of the court record.
14:31:00 - Plaintiff Attorney: ACKLEY, MARK
Comfortable with that.
14:31:17 - Operator
Stop recording:

ORIGINAL

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 ***EX PARTE* MOTION FOR EXPERT ACCESS TO PETITIONER** (CAPITAL CASE)

COMES NOW the Petitioner, ERICK VIRGIL HALL, by and through his attorneys at the Office of the State Appellate Public Defender and moves this Honorable Court to order the Department of Correction (DOC) and the Idaho State Maximum Security Institution (IMSI) to grant Dr. James Merikangas, M.D., of Bethesda, Maryland, a contact visit with Petitioner in a quiet and confidential setting suitable for interview, testing, and evaluation.

Further, although the Court denied Petitioner's motion to generally use *ex parte* procedures, but because the Court permitted counsel to apply on a case-by-case basis, Petitioner moves that this Order be granted *ex parte*. One of Dr. Merikangas' specialties,

neurology, is not of the type utilized in the underlying trial proceedings and Petitioner continues to object to premature disclosure of post-conviction strategy and work-product. This request is necessary to develop Petitioner's Claim B.1 in an upcoming amended petition.

Petitioner prays that such access be granted to Dr. Merikangas on the 4th day of April, 2006, from 8 a.m. to 5 p.m., and that said Order allow the medical equipment necessary to the examination, as specified in Attachment A.

This motion is made pursuant to I.C. §§ 19-4001, et seq., and 19-870 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and it is based upon all matters of record.

Dated this 15th day of March, 2006.

Respectfully submitted;

MARK J. ACKLEY
Lead, Capital Litigation Unit

PAULA M. SWENSEN
Deputy, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 14th day of March, 2006, served a true and correct copy of the forgoing *EX PARTE* MOTION FOR EXPERT ACCESS TO PETITIONER as indicated below:

ERICK VIRGIL HALL
INMATE # 33835
IMSI
PO BOX 51
BOISE ID 83707

____ Statehouse Mail
__✓__ U.S. Mail
____ Facsimile
____ Hand Delivery

Barbara D. Thomas
BARBARA D. THOMAS
Administrative Assistant

Medical Equipment Used by Dr. James R. Merikang

Metal Equipment

Otoscope
Opathmoscope
Stethoscope
Revolving pinwheel
Reflex hammer
Metal calipers
2 tuning forks
Metal stopwatch
Blood pressure cuff
Tape measure

Other Equipment

Plastic bottle of cloves
Plastic bottle of vanila
Pens
Pencils
Pad of paper
Plastic strip with stripes
Wooden tongue depressor
Cotton swabs
Peice of leather
Piece of cloth
Latex gloves

All enclosed in a leather physician's bag

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 West Front Street, Room 3191
Boise, Idaho 83702
Phone: 287-7700
Fax: 287-7709

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, vs. THE STATE OF IDAHO, Respondent,	**Case No. SPOT0500155** **STATE'S MOTION IN LIMINE TO PRECLUDE DEPOSITIONS WITHOUT COURT ORDER**

COMES NOW, Roger Bourne, Deputy Prosecuting Attorney, in and for the County of Ada, State of Idaho, and moves this Court for its order precluding the State Appellate Public Defender from conducting "one party depositions" of the Petitioner's trial team members or of other material witnesses. The State just became aware that the Petitioner was attempting to conduct a "one party deposition" upon reading an email from the State Appellate Public Defender to the State and the Court's clerk, dated March 22, 2006, concerning the need for a hearing on the issuance of subpoenas for the depositions. Since these so called depositions are

apparently scheduled without notice to the State, the State cannot be there to protect the witness or other State interests. The person being deposed is not fully examined nor prepared for the hearing so the Court does not get a full and accurate picture of the information relevant to whatever issue the deposition is for. Further, the State observes that no permission has been given by the Court for depositions as required by Idaho Criminal Rule 57(b). To the State's knowledge, no order allowing depositions has been granted by this Court. For those reasons, the State objects to depositions and moves this Court to require that no deposition be taken until further order of the Court.

RESPECTFULLY SUBMITTED, this 27 day of March 2006.

GREG H. BOWER
Ada County Prosecutor

R Bourne
Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing document was delivered to the State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 through the United States Mail, this 27 day of March 2006.

GREG H. BOWER
Ada County Prosecuting Attorney

Roger Bourne
Deputy Prosecuting Attorney
Idaho State Bar No. 2127
200 W. Front Street, Room 3191
Boise, Id. 83702
Telephone: (208) 287-7700

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,	
Petitioner,	**Case No. SPOT0500155**
	NOTICE OF HEARING
vs.	
THE STATE OF IDAHO,	
Respondent.	

TO: ERICK VIRGIL HALL, and STATE APPELLATE PUBLIC DEFENDER, his Attorney of Record, you will please take notice that on the 23rd day of June 2006, at the hour of 9:00 of said day, or as soon thereafter as counsel can be heard, Deputy Prosecuting Attorney Roger Bourne will move this Honorable Court on the State's Motion in Limine to Preclude Depositions Without Court Order in the above-entitled action.

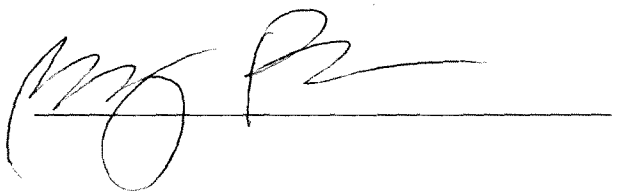
DATED this 27th day of March 2006.

GREG H. BOWER
Ada County Prosecuting Attorney

By: Roger Bourne
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing Notice of Hearing to State Appellate Public Defender's Office, 3647 Lake Harbor Lane, Boise, Idaho 83703 by depositing the same in the Interoffice Mail, postage prepaid, this 27 day of March 2006.



ORIGINAL

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, I.S.B. # 6722
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL, Petitioner, v. STATE OF IDAHO, Respondent.	CASE NO. SPOT0500155 **MOTION FOR ISSUANCE OF SUBPOENAS FOR DEPOSITIONS AND SUBPOENAS DUCES TECUM FOR PRODUCTION OF DOCUMENTS** **(CAPITAL CASE)**

COMES NOW the Petitioner, Erick Virgil Hall, by and through his counsel at the State Appellate Public Defender, and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Sections 5, 6, 7, and 8 of the Idaho Constitution, I.C. § 19-4901 et seq., § 19-2719, and I.C.R. 57(b), and moves this Court to issue subpoenas for the depositions of Amil Myshin, D.C. Carr, Glenn Elam, and Rosanne Dapsauski, as well as subpoenas duces tecum for the production of documents.

RELEVANT BACKGROUND

On January 5, 2006, Petitioner filed his Motion For Discovery and his Memorandum Of Law In Support Of Motion For Discovery, (herein "Memorandum"). Within these pleadings, Petitioner requested, and sought to justify, court-ordered depositions of Amil Myshin (lead counsel), D.C. Carr (co-counsel), Glenn Elam (Ada County Public Defender investigator), and Rosanne Dapsauski (trial team agent/mitigation specialist), among others. Motion For Discovery, p. 24; Memorandum, pp. 17-18. On or about January 19, 2006, the State filed a blanket objection to all requests for discovery. On or about February 28, 2006, the State filed a memorandum in support of its objection. Neither of the State's pleadings addressed Petitioner's specific requests for court-ordered depositions. A hearing on the pleadings was set for March 2, 2006.

Prior to the hearing, Petitioner, through counsel, reached an agreement with the State to continue the hearing so that Petitioner could file an amendment to his petition. The purpose of the amendment was to connect his discovery requests to specific claims not raised in his initial petition. The agreement was premised on Petitioner's assertion that the amended petition would not be considered a final petition. As Petitioner's counsel stated, in part, via an email message to Court staff, and "carbon copied" to the State:

> I spoke to Roger earlier this afternoon and we both agreed that tomorrow's hearing would be best served by scheduling a deadline for the filing of an amended petition and rescheduling the discovery hearing. The deadline would not constitute the conclusion of these post-conviction proceedings but rather a deadline to raise claims identified to date and appears a necessary step prior to a meaningful discovery hearing.

Exhibit A.

At the hearing held March 2, 2006, the Court inquired how much time Petitioner would require for filing an amended petition. Petitioner's counsel indicated that the amount of time

depended on whether the amended petition would be considered a final petition subject to potential summary dismissal, or, as envisioned by counsel, a means of ensuring a productive discovery hearing, with leave for subsequent amendment. If the deadline were set for the latter purpose, then counsel suggested four to six weeks. However, if the deadline were set for the filing of a final petition, then counsel could not give a specific date but did state that Petitioner would require much more time. After some discussion, the Court declined to indicate whether further amendments would be permitted, imposed a deadline of April 17, 2006, for the filing of an amended petition, imposed a deadline of June 9, 2006, for the filing of any amended discovery motion, and continued the discovery hearing to June 23, 2006.[1] Petitioner thereafter sought to pursue his discovery requests as previously scheduled. The Court refused, indicating that it had already placed two civil cases on its docket. Petitioner then asked to at least have his request for depositions heard. The Court refused Petitioner's request.[2]

Petitioner has recently sought recorded sworn statements from trial team members, without resorting to a court order. For various reasons, the trial team members have refused to cooperate. The lack of adequate cooperation will be detailed in forthcoming affidavits from members of Petitioner's current post-conviction team.

I. Depositions Of The Trial Team Members, And The Production Of Documents Within Their Possession, Are Necessary For Meaningful Post-Conviction Proceedings.

---

[1] By scheduling the discovery hearing for June 23, 2006, the Court implicitly determined that Petitioner would be permitted to amend his petition with evidentiary support or claims as warranted by any court-ordered discovery. Nevertheless, out of the abundance of caution due capital cases, Petitioner's counsel believes the most diligent approach is to pursue depositions without waiting nearly three months to be heard.

[2] This rendition of facts is made in good faith and to the best of counsels' recollection without resort to court minutes and without access to a transcript of the hearing.

Petitioner has a state and federal due process right to meaningful post-conviction review that guarantees him a full and fair opportunity to develop claims of trial error. *See Evitts v. Lucey*, 469 U.S. 387, 401(1985)("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause."); *State v. Beam*, 121 Idaho 862, 864, 828 P.2d 891, 893 (1992)(recognizing that the absence of meaningful capital post-conviction proceedings may violate due process); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999)("failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process"); *see also Roberts v. State*, 840 So.2d 962, 971 (Fl. 2002) (recognizing that while post-conviction proceedings are designated civil, they "involve interests and considerations that are more closely aligned with those traditionally and fundamentally protected in criminal proceedings" and thus must comport with due process)(citations omitted).

A. Depositions

Petitioner has raised several grounds for relief, including claims of ineffective assistance of counsel, in his initial petition for post-conviction relief. Through depositions Petitioner seeks to provide evidentiary support for claims raised as well as support for claims not yet raised, but identified through his independent investigation. In addition, Petitioner requires depositions as an investigative tool because members of Petitioner's trial team have not provided adequate consultation.

Petitioner generally bears the burden of proving his grounds for relief by a preponderance of the evidence. I.C.R. 57(c). The Supreme Court set out the elements for claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 687 (1984). First, Petitioner

must show that counsel's performance was deficient. Second, Petitioner must show that the deficient performance prejudiced the defense. To prove deficient performance Petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Petitioner must "reconstruct the circumstances of counsel's challenged conduct" for an objective evaluation from counsel's perspective at the relevant time. *Id.* at 689. Petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* To rebut this presumption Petitioner must probe counsels' decision-making process through depositions.

Petitioner requires depositions for four reasons: (1) to fully develop claims raised in Petitioner's initial petition; (2) to determine whether counsels' challenged decisions were the result of sound trial strategy;[3] (3) to fully develop claims not yet raised but identified through investigation conducted after filing Petitioner's initial petition; and (4) to identify additional claims for post-conviction relief whether such claims involve the ineffective assistance of counsel or judicial, juror, or prosecutorial misconduct.[4] *See Coleman v. Zant*, 708 F.2d 541, 548 (11th Cir. 1983) (relying in part on the denial of depositions at the state post-conviction level in finding that the federal habeas petitioner had been denied a full and fair opportunity to develop facts to support his ineffective assistance of counsel claim); *Davis v. State,* 624 So.2d 282, 283-84 (Fla. 1993) (holding that the petitioner raising an issue of ineffective assistance of counsel

[3] If trial counsel asserts, or the Court presumes, challenged decisions were strategic, then Petitioner must inquire into the decision-making process to determine whether such decisions were unreasonable because made with inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *See Campbell v. State,* 130 Idaho 546, 548, 944 P.2d 143, 145 (Ct. App. 1997).

[4] Depositions would not be so critical for each of these reasons but for trial counsels' failure to honor their ethical obligation to make themselves accessible for adequate and voluntary consultation with Petitioner's current counsel. *See infra,* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, (herein "ABA Guidelines"), Guideline 10.13 and Commentary.

should have been permitted to take the deposition of his trial counsel); *see generally Harris v. Nelson*, 394 U.S. 286, 300 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir.1995) ("Denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim."); *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir.1996) (noting that "a court's denial of discovery is an abuse of discretion if discovery is indispensable to a fair, rounded, development of the material facts")(internal quotation marks omitted); *Jones v. Wood*, 114 F.3d 1002, 1009-10 (9th Cir. 1997) (same).

Petitioner cannot rely on the procurement of affidavits, or other investigative methods, as a substitute for court-ordered depositions for three reasons. First, Petitioner has not received adequate and voluntary cooperation from trial counsel in these post-conviction proceedings despite trial counsels' ethical obligations to facilitate Petitioner's representation. As set forth in the ABA Guidelines,

> In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:
>
> A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
>
> B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
>
> C. sharing potential further areas of legal and factual research with successor counsel; and
>
> D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

ABA Guidelines, Guideline 10.13 ("The Duty To Facilitate The Work Of Successor Counsel") (rev. ed.2003), *reprinted in* 31 Hofstra L.Rev. 913, 956-57 (2003).[5] The lack of adequate cooperation will be detailed in forthcoming affidavits from members of Petitioner's current post-conviction team[6], but has included, at a minimum, the failure to disclose all files and notes in a timely fashion, the failure to communicate with post-conviction counsel, and the failure to cooperate in post-conviction counsels' legal strategy to pursue one-party depositions, i.e., oral affidavits, as an alternative to court-ordered depositions.[7] Petitioner's counsel is therefore forced to pursue more aggressive measures to compel cooperation. Indeed, according to the Commentary to ABA Guidelines, Guideline 10.13, consulting with trial counsel is an "absolutely critical" part of post-conviction counsels' independent and thorough investigation.

> The duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights. "[T]he strategic thinking of the lawyer, and learning this strategic thinking[,] is absolutely critical to the thorough presentation of a post-conviction claim. It should be routinely and openly presented to the post-conviction counsel." To do otherwise is professionally unethical.2
> ...
>
> fn2 *See id.* ("[G]iven the peculiar aspects of the role of counsel whose former client brings a post-conviction action, [it] violates counsel's ethical obligations"

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[5] The ABA Guidelines in their entirety can be accessed via the internet at http://www.probono.net/deathpenalty/index.cfm.

[6] *See* I.R.C.P. 56(f) ("Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."); *see also* I.C. § 19-4906(c), specifically referencing depositions one method for supporting a petitioner's claims prior to an evidentiary hearing.

[7] The State has filed an objection to any court-ordered one-party depositions. This motion is based on the assumption that any court-ordered deposition would provide both parties the opportunity to examine the deponents.

> to fail to cooperate with successor counsel in "the disclosure to the post-conviction counsel of files and notes from the representation, the volunteering of absences in the record and the volunteering of counsel's strategic thinking in the case."); Meegan B. Nelson, Note, *When Clients Become "Ex-Clients": The Duties Owed After Discharge*, 26 J. LEGAL PROF. 233, 241 (2002) ("Essentially, a failure to cooperate with the client's new attorney can constitute the same violations as a failure to cooperate with the actual client under Model Rule 1.16."); *see generally* State Bar of Ariz Comm. on the Rules of Prof'l Conduct, Formal Op. 98-07 (1998) (discussing ethical obligations surrounding file retention and surrender to clients and successor counsel); *Returning Client Files After Termination*, HAWAII BAR J., Sept. 1998, at 16 (finding an ethical obligation to release to the client "all file materials which, if not released . . . would prejudice the rights of the client").

ABA Guideline 10.13, Commentary.

Second, court-ordered depositions, unlike affidavits, are the only pre-evidentiary hearing mechanism for fully and fairly developing Petitioner's claims. *See e.g., Russell v. Acme-Evans Co.,* 51 F.3d 64, 68 (7th Cir.1995) (holding that it is proper under most circumstances to disregard an affidavit when the affidavit contradicts the witness's prior deposition testimony); *Kiser v. Caudill*, 599 S.E.2d 826, 830-34 (W.Va. 2004) (holding that the failure to consider an affidavit that contradicted earlier deposition testimony was not an abuse of discretion). Indeed, the logistics involved in finalizing an affidavit from trial counsel are onerous and time-consuming, and a near impossibility in light of trial counsels' resistance to voluntary cooperation.[8]

Third, court-ordered depositions, unlike affidavits or other discovery methods, are the only mechanism, short of testimony at an evidentiary hearing that provides both parties, as well as trial team members, a full opportunity "to reconstruct the circumstances of counsel's

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[8] Petitioner's lead counsel has experience with attempting to obtain an affidavit from trial counsel, Amil Myshin, in other cases as well. For example, the logistical difficulties involved in the revision and finalizing process of an affidavit in the capital post-conviction case of Darrell E. Payne v. State of Idaho, Ada County case no. SPOT0200630D, led to the submission of an unsigned affidavit.

challenged conduct." *Strickland,* 466 U.S. at 689.[9] Thus, an affidavit from trial counsel, while useful, does not present a format conducive for full presentation of all the circumstances surrounding their decision-making. As noted by the United States District Court for the Southern District of New York,

> [D]epositions are preferable if a searching interrogation of the other party is desired. At a deposition the examining party has great flexibility and can frame the questions on the basis of answers to previous questions. Moreover, the party being examined does not have the opportunity to study the questions in advance and to consult with counsel before answering, as is the case if interrogatories are used. Attempts at evasion, which might be stymied by a persistent oral examination, cannot easily be countered by interrogatories. The flexibility and the potency of oral depositions is in large part lacking in written interrogatories.

Madanes v. Madanes, 199 F.R.D. 135, 142 (S.D.N.Y. 2001)(citation omitted); *see also Hendricks v. Coughlin*, 114 F.3d 390, 394 (2d Cir.1997).

Petitioner is not aware of any Idaho capital post-conviction case where a request for the deposition of a trial team member was denied by a district court. For instance, Petitioner's lead counsel deposed both trial counsel and defense team investigators in the capital post-conviction cases of Jimmie V. Thomas v. State of Idaho, Jerome County case no. SPOT99-112 and Dale C. Shackelford v. State of Idaho, Latah County case no. CV2001-0004272.[10] In addition, Petitioner's lead counsel is aware that post-conviction depositions of both trial counsel were

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[9] This is not to say that one-party depositions, i.e., sworn recorded statements, written affidavits, or other documentation do not provide competent evidentiary support for a petition for post-conviction relief. Idaho Code § 19-4903 specifically provides that, "Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached."

[10] Depositions were not requested by Petitioner's lead counsel in Michael A. Jauhola v. State of Idaho, Ada County case no. SPOT0100492D; however, in that case, the district court indicated early on that an evidentiary hearing would be granted over any motion for summary dismissal. Trial counsel were both questioned at the evidentiary hearing. Lead counsel did not request depositions of trial counsel in Darrell E. Payne v. State of Idaho, Ada County case no. SPOT0200630D, *see supra* n4.

taken in Timothy A. Dunlap v. State of Idaho, case no. SP-94-863. *See also, Rhoades v. State,* 135 Idaho 299, 302, 17 P.3d 243, 246 (2000)(noting post-conviction depositions taken of trial counsel). Petitioner asserts that the denial of depositions in these post-conviction proceedings, under these circumstances, would violate Petitioner's state and federal rights to equal protection of the law, his due process right to meaningful post-conviction review, and would constitute an arbitrary denial of the procedural safeguards necessary to protect Petitioner's substantial rights, as guaranteed by the Due Process Clause and the Eighth Amendment. *See e.g., Lankford v. Idaho,* 500 U.S. 110, 125-27 (1991)(relying on due process in weighing the "special importance of fair procedure" in capital cases); *Woodson v. North Carolina*, 428 U.S. 280 (1976)(relying on the Eighth Amendment for affording "heightened reliability" in capital cases).

B. Production Of Documents

For the same legal grounds discussed above, and incorporated herein by reference, Petitioner requests subpoenas duces tecum for the production of documents previously requested in his Motion For Discovery, p. 24. Specifically, Petitioner requests documentation identifying the cases each trial team member worked on from April 1, 2003, through January 18, 2005. (Tr., p. 215, L. 24 – p. 216, L. 2 (noting Amil Myshin's heavy workload including a manslaughter trial scheduled for April 2004), as well as all e-mail correspondence between trial team members and the prosecutor's office. (Tr., p. 249, Ls. 8-14.) In addition, Petitioner requests the production of all email correspondence between the trial team and the Court or Court personnel, as well as all files and notes in the trial team's possession not previously disclosed to post-conviction counsel. *See supra,* ABA Guidelines, Guideline 10.13 and its Commentary. The basis for this request with be further justified in forthcoming affidavits from members of Petitioner's current post-conviction team.

CONCLUSION

In conclusion, Petitioner respectfully requests this Court to issue subpoenas for the aforementioned trial team members' attendance for their depositions at a date and location to be determined at the hearing on this motion. Petitioner also respectfully requests this Court to issue subpoenas duces tecum for the production of documents, limited to Petitioner's review, and prior to the date scheduled for depositions.

DATED this 31st day March, 2006.

MARK J. ACKLEY
Lead Counsel, Capital Litigation Unit

PAULA M. SWENSEN
Co-Counsel, Capital Litigation Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of March, 2006, a true and correct copy of the foregoing document, MOTION FOR ISSUANCE OF SUBPOENAS FOR DEPOSITIONS AND SUBPOENAS DUCES TECUM FOR PRODUCTION OF DOCUMENTS, was mailed, postage prepaid, to the following:

ERICK VIRGIL HALL INMATE # 33835 IMSI PO BOX 51 BOISE ID 83707	✓ U.S. Mail ____ Statehouse Mail ____ Facsimile ____ Hand Delivery
ROGER BOURNE ADA COUNTY PROSECUTOR'S OFFICE 200 W. FRONT, SUITE 3191 BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile ✓ Hand Delivery ____ E-Mail
THOMAS F. NEVILLE DISTRICT JUDGE 200 W. FRONT BOISE ID 83702	____ U.S. Mail ____ Statehouse Mail ____ Facsimile ✓ Hand Delivery ____ E-Mail

Barbara Thomas
BARBARA THOMAS
Administrative Assistant

MJA/bt

Mark Ackley

From: Mark Ackley
Sent: Wednesday, March 01, 2006 4:52 PM
To: 'Janet Ellis'
Cc: 'Roger Bourne'; Paula Swensen
Subject: RE: Tomorrow's hearing

Janet,

I spoke to Roger earlier this afternoon and we both agreed that tomorrow's hearing would be best served by scheduling a deadline for the filing of an amended petition and rescheduling the discovery hearing. The deadline would not constitute the conclusion of these post-conviction proceedings but rather a deadline to raise claims identified to date and appears a necessary step prior to a meaningful discovery hearing.

I assume you must be in a hearing as I have not been able to reach and have not heard back from Roger who was going to contact you immediately. If the Court would like to hear from us tonight, then I will be available at 947-9259 (my office line) between 5 and 6 pm.

If you could please leave me an email on the status of tomorrow's hearing, even if there is no present change in status, it would be much appreciated. The status will affect our preparation this evening. Thanks a lot.

Mark

-----Original Message-----
From: Mark Ackley
Sent: Wednesday, March 01, 2006 1:36 PM
To: 'Roger Bourne'
Cc: Paula Swensen; 'Janet Ellis'
Subject: Tomorrow's hearing

Roger,

I just dropped you a voice-mail message regarding tomorrow's hearing. Specifically, I would like to continue the hearing, if possible, to a date in the near future. If we cannot get a date in the near future, then we are prepared to go forward tomorrow. The reason for the request of the continuance is to provide us an opportunity to reply to your Objection (received at the end of the day yesterday) as well as to provide a written outline to you and the Court identifying the relevance of our specific requests to claims in our petition. In light of your Objection, I anticipate such an outline could really expedite matters.

Further, and not mentioned in the voice-mail message, our investigator just received a full banker's box of new materials (and identified another) from the Ada County Public Defender's office despite the fact that we had requested all such materials previously...on multiple occasions. It may likely be that our review of the materials in these two boxes leads to revisions to our discovery motion.

These are the dates we would be available if you and the Court are amenable to rescheduling. March 14-17 or March 21-24. April is wide open.

I can be reached directly in my office at 947-9259. At 2:30, I will be moving to our conference room and can be reached through our general office line at 334-2712. Thanks.

- Mark

EXHIBIT "A"

MOLLY J. HUSKEY, I.S.B. # 4843
State Appellate Public Defender
State of Idaho

MARK J. ACKLEY, I.S.B. # 6330
PAULA M. SWENSEN, ISB # 6722
ERIK R. LEHTINEN, ISB # 6247
Deputy State Appellate Public Defenders
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

SPOT 0500155

CASE NO. ~~H0300518~~

AMENDED PETITION FOR POST-CONVICTION RELIEF

(Capital Case)

ORIGINAL

COMES NOW the Petitioner, Erick Virgil Hall, by and through his attorneys at the State Appellate Public Defender, and petitions this Honorable Court for post-conviction relief from the conviction and sentences imposed by this Court in the Fourth Judicial District, in State v. Hall, Ada County case no. H0300518, on January 18, 2005. This Court has jurisdiction over the action pursuant to I.C. § 19-2719; §§ 19-4901, *et seq.*; I.C.R., Rules 35 and 57; and Article I, Sections 1 and 5 of the Constitution of the State of Idaho. Petitioner relies on Article I, §§ 1, 5, 6, 7, 8, 13, 17, and 18 of the Constitution of the State of Idaho, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as International Human Rights Law in support of this Amended Petition for Post-Conviction Relief (herein "Amended Petition").

00155

I. BACKGROUND (I.C.R. 57(a)(1) through (a)(6))

1. Petitioner is in the custody of the State of Idaho Department of Correction, detained at the Idaho Maximum Security Institution near Boise, Idaho.

2. Judgment and sentence were pronounced by the Honorable Thomas F. Neville, District Judge of the Fourth Judicial District of the State of Idaho, in Ada County, Boise, Idaho.

3. Petitioner stands convicted in Ada County case no. H0300518 of the crimes of:

   Count I, Murder in the First Degree

   Count II, Rape

   Count III, Kidnapping in the First Degree

4. The Court imposed sentences as follows on the 18th day of January, 2005:

   Count I, for Murder: Death

   Count II, for Rape: Life in Prison without possibility of parole

   Count III, for Kidnapping: Life in Prison without possibility of parole

   The sentences for Counts II and III are to run consecutively.

5. Petitioner pled not guilty and a jury returned verdicts of guilty to the crimes charged.

6. Other than post-trial motions and a Notice Of Appeal, which cannot be litigated under Idaho law until these post-conviction matters are concluded, this is Petitioner's first attempt in any court to obtain relief from the convictions and sentences herein challenged.

II. ILLEGAL RESTRAINT OF LIBERTY

Petitioner is a person restrained of his liberty in that he is a prisoner of the State of Idaho, under the custody of the Idaho State Board of Corrections, held on death row at the Idaho Maximum Security Institution. This restraint is pursuant to the following conviction and sentence imposed on January 18, 2005, by this Court presiding in the Fourth Judicial District, in State v. Hall, Ada County case no. H0300518: Murder in the First Degree, Kidnapping in the First Degree, and Rape. This restraint is illegal in that the convictions and sentences were obtained in violation of the constitutions of the United States and of the State of Idaho and in violation of court rules, statutes and other law as set forth below.

III. LACK OF SPECIFICITY – NEED TO AMEND

This Amended Petition is filed according to the time constraints imposed by this Court. Due to these time constraints, it is impossible for Petitioner to file a petition that complies with I.C. §§ 19-4901, *et seq;l,* § 19-2719; and I.C.R. 57, because of the following factors, among others:

1. The Court appointed Petitioner's present counsel to represent him in post-conviction proceedings on February 17, 2005;
2. Counsel for Petitioner had no participation in the criminal case leading to the conviction and sentences herein challenged;
3. The underlying sentence of death represents the first death sentence imposed since inception of a new and untested death penalty scheme, and thus contains many complicated issues of first impression in the State of Idaho;

4. A copy of the Reporter's Transcript was not received until on or about September 26, 2005; and

5. Present counsel has not had a meaningful opportunity to conduct an independent investigation due to the following factors:

- Petitioner's current counsel have not yet reviewed all transcripts received. A claim of ineffective assistance of counsel requires a thorough review of the trial transcript and the entire record to determine the nature, frequency and effect of counsel's errors, *Hoffman v. Arave*, 236 F.3d 523, 535 (9th Cir. 2001). In this case, the trial transcript, grand jury transcripts, and transcripts of interrogations total over six thousand (6000) pages. The Clerk's Record numbers over five hundred (500) pages, not including the Presentence Investigation Report. A thorough review of the transcript has been sacrificed to accommodate the investigation and litigation of other matters that would not have otherwise been necessary but for the State's failure to voluntarily comply with their discovery obligations and due to court-imposed time constraints and other restrictions placed on Petitioner's ability to adequately reinvestigate his case.

- Petitioner's current counsel are still awaiting all requested transcripts including a complete Reporter's Transcript of the underlying criminal proceedings, and a copy of the Grand Jury transcript from State v. Hall, Ada County Case No. M9108836/HCR18591.[1]

- Petitioner's trial team has refused to adequately cooperate with Petitioner. This lack of cooperation has included their failure to disclose all their files and notes, and their failure to return email and voicemail messages or otherwise adequately consult with Petitioner. *See* Motion for Issuance of Subpoenas Duces Tecum and Subpoenas for Depositions incorporated herein by reference.[2]

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[1] A copy of this transcript was requested in Petitioner's Motion For Discovery filed January 5, 2006, and currently scheduled for a hearing on June 23, 2006.

[2] The single most troubling aspect of Petitioner's reinvestigation of this case has been the trial team's unwillingness to cooperate. Petitioner's current counsel simply cannot meet their obligations without the cooperation of trial counsel. ABA Guideline 10.7.B.1. provides that post-conviction counsel "have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel."

- Petitioner is still awaiting a hearing on his Motion For Discovery in which he requested materials including *Brady* material. *See* Motion For Discovery, filed January 5, 2006. *See Moore v. Kemp*, 809 F.2d 702, 730 (11th Cir. 1987) (defendant who was not given *Brady* materials in state post-conviction proceedings did not get "full and fair" hearing in the state courts). The hearing is currently scheduled for June 23, 2006.

- Petitioner is still awaiting receipt of the completed jury questionnaires. The questionnaires were the parties' "bible" during voir dire. (Tr., p. 5445, Ls. 1-3.)

- The poor condition of the transcript received precludes meaningful post-conviction review. There can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956). In this case, the transcript quality is so poor that it amounts to a violation of both equal protection and due process to proceed upon this record. In a capital case, the Eighth Amendment is also violated. Petitioner will submit, at a later date, a report of transcription errors.

- Petitioner has, to this point, been restricted from contacting jurors due to limitations set by this Court not otherwise required by Idaho law. Petitioner intends to file another motion with the Court to show that unrestricted jury contact is necessary for meaningful post-conviction proceedings.

- The Court's time constraints and the uncertainty whether the Court will permit further amendment have forced Petitioner to sacrifice what was a methodical and thorough reinvestigation of the underlying case. To avoid procedural default, Petitioner must raise claims that he might not otherwise have raised after a complete investigation.

Competent post-conviction representation requires a reinvestigation of the underlying criminal case for all potentially meritorious guilt and sentencing-phase claims inside and outside the record. *See* 2003 American Bar Association Guidelines for the Appointment and Performance of Trial counsel in Death Penalty Cases (herein "ABA

Guidelines"), Guideline 10.15.1 ("Duties Of Post-Conviction Counsel")(Exhibit 1.) The Commentary to Guideline 10.15.1 provides in part:

> Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

Petitioner's reinvestigation must be both diligent and exhaustive, aimed at including all possible grounds for relief since the failure to raise all possible claims may result in a procedural bar. *See* I.C. § 19-2719 (3), (5); *Pizzuto v. State,* 127 Idaho 469, 903 P.2d 58 (1995); *State v. Rhoades,* 120 Idaho 795, 820 P.2d 665 (1991). Further, the reinvestigation can neither rely solely on the assistance and investigation of trial counsel, nor upon the discovery provided by the State or its agents during the underlying criminal proceedings. *See e.g., Hoffman, supra* (recognizing the inability or difficulty of trial counsel's objective examination of their own performance); I.C.R. 44.2 (requiring the appointment of at least one attorney other than trial counsel for the purpose of representing the defendant in post-conviction proceedings). At this point, while Petitioner has been diligent, due to the reasons noted above, his reinvestigation has not been exhaustive.[3] Accordingly, Petitioner will seek this Court's leave to file a final amendment

[3] A 1998 survey of the time and expenses required in Florida capital post-conviction cases concluded that:

> [T]he most experienced and qualified lawyers at Florida's post-conviction defender office, the Office of Capital Collateral Representation[,] have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the

to his petition pursuant to I.C. § 19-4906(a) and ICR 15, after a reasonable opportunity to review any court-ordered discovery following the hearing currently scheduled June 23, 2006.

For reasons stated more fully herein, Petitioner requests that these post-conviction proceedings be SUSPENDED until resolution of the State's prosecution against him for the capital murder of Cheryl Hanlon. However, because the Court has not had an opportunity to consider a formal motion to suspend these proceedings, and based on the Court's deadline, in support of this Amended Petition, Petitioner is able to show the Court as follows:

IV. GROUNDS FOR RELIEF

Petitioner asserts that the convictions and sentences entered against Petitioner were obtained in violation of laws of the United States and of Idaho, including the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, §§ 1, 5, 6, 7, 8 13, 17, and 18, of the Constitution of the State of Idaho, provisions of the Idaho Code and the Idaho Criminal Rules as well as international law.

Within this Amended Petition, Petitioner has raised numerous grounds for relief based on various types of claims including, but not limited to, claims of ineffective assistance of counsel (*Strickland* claims) as well as *Brady* violations.[4] Petitioner alleges

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United States Supreme Court following direct appeal to the denial of certiorari [from state post-conviction proceedings.]

ABA Guidelines, Commentary to Guideline 6.1 (citing "The Spangenberg Group, Amended Time & Expense Analysis Of Post-Conviction Capital Cases In Florida 16 (1998).")

[4] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984), and *Brady v. Maryland,* 373 U.S. 83 (1963). To prove a *Strickland* violation, Petitioner must show (1) deficient

that he is entitled to relief on each independent claim. Further, Petitioner alleges that even if the claims do not meet the governing level of prejudice on their own, that when jointly considered, the accumulation of error creates the degree of prejudice entitling Petitioner to relief. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992).

A. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSELS' FAILURE TO ACT WITH DILIGENCE IN ENSURING THAT ALL THEIR CLAIMS WERE FULLY INSULATED FROM ANY FUTURE CLAIMS BY THE GOVERNMENT THAT THE CLAIMS WERE NOT SUFFICIENTLY PRESERVED.

Trial counsel must be diligent in protecting a defendant's constitutional claims from future attacks by the government that the claims were not properly preserved appellate and federal *habeas corpus* proceedings. *See* ABA Guidelines, Guideline 10.8.A.3.c. As stated in part in the Commentary,

> One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.

Commentary, ABA Guidelines, Guideline 10.8 (footnotes and quotations omitted).

1. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Fully Insulate "Motion To Allow Defense To Provide Copy Of Grand Jury Transcript To Defendant" From Future Attacks By The Government That The Claim Was Not Sufficiently Preserved.

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performance and (2) prejudice. Prejudice is established by showing that but for counsels' deficient performance, there is a reasonable probability that the outcome would have been different. A reasonable probability is a probability that undermines confidence in the outcome of the trial or sentencing. To prove a *Brady* violation, Petitioner must show that the State failed to disclose (1) material and (2) exculpatory evidence. Materiality has been defined to mean a "reasonable probability of a different result." Where not otherwise stated herein, Petitioner asserts that he has established all requisites for his *Strickland* and *Brady* claims.

Trial counsel moved to be allowed to provide grand jury transcripts to Petitioner. (R., pp. 51-52.) The motion was partially denied. The Court specifically limited copies of grand jury transcripts to counsel and counsel's staff and experts. The Court specifically ordered that trial counsel was not permitted to provide copies to the defendant. (R., pp. 24-26, pp. 55-57.) The Court did allow trial counsel to review the transcripts with the client, but this was never adequate to allow Petitioner to read the transcript in its entirety or adequately review the transcripts for inaccuracies or discrepancies.

While trial counsel did state that the "Defendant has State and Federal Constitutional Rights to confront the witnesses against him and to a fair trial," (R., p. 51), they did not state the specific constitutional provisions upon which they were relying. Counsel should have rested their motion on the following Constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which in addition to the rights noted by counsel, including the defendant's right to due process, the right to counsel, the right to assist counsel in his defense, and the right to present a defense. Because this is a capital case, counsel should always raise their client's Eighth Amendment rights.

2. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Fully Insulate Their "Motion To Declare Idaho's Capital Sentencing Scheme Unconstitutional" From Future Attacks By The Government That The Claim Was Not Sufficiently Preserved.

Trial counsel rendered ineffective assistance of counsel in failing to fully protect their challenges to the constitutionality of the new death penalty statute claims from procedural default attacks from the government. While trial counsel did cite numerous United States Supreme cases, because of the near certainty that the government will

assert some sort of procedural bar on nearly every claim in state appellate and federal habeas corpus proceedings, trial counsel should have specified specific constitutional provisions violated if for no other reason than to foolproof the claim against any challenges.

For instance, trial counsel complained that there are no definitions or explanations of weighing, sufficiently compelling, unjust, mitigating circumstances, and that the statute fails to explain the weighing process or define aggravating circumstances. (R., pp. 204 - 205.) It is a fair reading of the motion that trial counsel challenged these statutory provisions based on the case law set forth elsewhere in the motion. To absolutely ensure subsequent consideration of the claims on their merits, trial counsel should have rested their motion on the following constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[5]

3. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Any Constitutional Grounds In Support Of Their Motion To Establish Procedure During Voir Dire.

Trial counsel did not cite to one state or federal constitutional provision as authority for their motion. (R., pp. 201-208.) Counsel should have rested their motion on the following Constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

[5] Petitioner does not concede that the claims in this particular motion are not properly preserved for future review, but makes this claim on the basis that counsel had a duty to full-proof their claims against any conceivable procedural attack. In light of the wealth of case law in which condemned inmates have lost valid claims under severe default rules, Petitioner is struck by the short-sighted and even flippant approach trial counsel took to their motion practice, at times captioning motions, "Yet Another Motion To…" and often not citing to a single constitutional provision in support. (R., pp. 142-44.)

4. **Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Any Constitutional Grounds In Support Of Their "Motion in Limine" To Preclude IRE 404(b) Evidence.**

Trial counsel made one motion in limine. (R., pp. 372-374.) In this motion, counsel moved to exclude I.R.E. 404(b) evidence that the State gave notice it intended to introduce, namely, the 1991 rape case involving Norma Jean Oliver, the 1994 case involving Petitioner's escape, the pending Hanlon murder case, and the statements of Amanda Stroud. Trial counsel did not cite a single amendment, provision, or clause of the United States or Idaho Constitutions, although they did mention the inability to cross-examination and confront particular witnesses.

Counsel should have rested their motion on the following constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In particular, trial counsel should have argued that the Petitioner's rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment would be violated by admission of this evidence.

5. **Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Any Constitutional Grounds In Support Of Their "Motion to Exclude."**

Trial counsel moved to exclude the testimony of the "various women [defendant] has lived with who knew him in 2001, 2002, and 2003," and which that State intended to call to testify to establish the propensity aggravator. (R., p. 405.) Trial counsel did not cite a single amendment, provision, or clause of the United States or Idaho Constitutions, although they did mention the inability to cross-examination and confront particular witnesses.

Counsel should have rested their motion on the following constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In particular, trial counsel should have argued that the Petitioner's rights under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment would be violated by admission of this evidence.

6. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Any Constitutional Grounds In Support Of Their "Ex Parte Motion to Appoint Jury Selection Consultant."

Trial counsel moved ex parte to hire a jury selection consultant, Attorney Rolf Kehne. (R., pp. 464-465.) The ex parte motion stated in relevant part:

> ...AMIL N. MYSHIN and D.C. CARR, handling attorneys, hereby moves this honorable Court, ex parte, to appoint and to approve payment of Rolf Kehne as a jury selection consultant to help select the jury in the above-entitled case. Mr. Kehne has been helping trial counsel adjust to the new jury-sentencing law and trial counsel wishes to have his help during jury selection.

(R., p. 464.) The Court granted the motion, but when it became apparent that the jury consultant was assisting counsel in making legal arguments and potentially briefing constitutional issues, the jury consultant was dismissed.

> ...THE COURT: I want to talk about a couple of things here. I have great respect for Mr. Kehne's professional competence. But it's -- as I understood the brief discussion Mr. Myshin and I had off the record in chambers when he brought me the ex party (sic) motion early yesterday afternoon, he was to act as a consultant to help him, Mr. Myshin and Mr. Carr, ask appropriate questions. I'm now getting a cite Whitt (sic) v. Waynewright (sic) that I've not heard before, that I've never had a chance to look at. Sixth Amendment has been referred to in ways that are unclear without a chance to reflect on it, and a brief that's promised after the weekend.
> ...
> I had -- if it's okay with you, Mr. Myshin, I'll make a brief statement of a very brief conversation we had -- you and I had in chambers a moment ago. My understanding is that the Defense team did not intend to file a brief. When we left here Friday night there was some indication that you

were crediting that. Second, that I understood that Mr. -- you're not going to be employing Mr. Kehne from this point forward as a jury consultant if I understood you correctly.

MR. MYSHIN: Yes, sir.

(Tr., p. 2061, Ls. 9 p. 2062, L. 14; p. 2067, Ls. 10-21) (sic added)[6]

At no time did counsel state the constitutional bases for their requests. (R., pp. 464-465.) Counsel should have rested their motion, and objected to Mr. Kehne's dismissal, on the following Constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In particular, counsel needed to argue that the Sixth Amendment right to counsel requires effective assistance at all critical stages, and that the jury selection process is a critical stage of the proceedings in a capital case.

7. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Raise Any Constitutional Grounds In Support Of Their "Motion To Strike/Dismiss Aggravating Circumstances."

Trial counsel did not cite to one state or federal constitutional section or amendment as authority for their motion. (R., pp. 186-89.) Trial counsel argued that the prosecutor failed to provide adequate legal definitions for the Grand Jury to perform its constitutional function. Without jury instructions with proper limiting construction regarding the aggravating circumstances, the grand jury could not intelligently decide whether a crime (here the aggravators) had been committed. *People v. Calbud*, 402 N.E.2d 1140 (N.Y. 1980); *State v. Superior Court*, 580 P.2d 747 (Ariz. App. 1978). The failure to provide the limiting instructions violated Petitioner's state constitutional rights,

[6] After Mr. Kehne was dismissed from the case, the case of *Wainwright v. Witt*, by any spelling, was never mentioned again.

Article I, Section 8, as well as his federal constitutional rights under the Eighth and Fourteenth Amendments (Due Process Clause) to the United States Constitution.

In addition trial counsel rendered ineffective assistance of counsel by failing to obtain a ruling on their motion to dismiss the propensity aggravator. On March 15, 2004, trial counsel filed a Motion To Strike/Dismiss Aggravating Circumstances. (R., pp. 186-89.) Among the grounds for their motion, trial counsel asserted that the Grand Jury improperly considered evidence from a subsequent murder as support for the propensity aggravator, I.C. 19-2515(9)(h). (R., pp. 187-88.)

Trial counsel requested that, "[the propensity] aggravating circumstance be stricken or dismissed." (R., p. 188.) In its Memorandum Decision And Order, the Court changed trial counsel's request for relief to a request for an evidentiary ruling on a motion in limine. As the Court stated, "[t]he second issue is whether the Indictment for the alleged murder in a case subsequent in time to this case can be used to support the statutory aggravator of "propensity" in this case." (R., p. 378) (footnote omitted). The Court rendered the following advisory opinion:

> So just as a heads up, I will strike the aggravating circumstance of propensity if the State does not offer evidence of conduct in the commission of the murder at hand, because I believe that the subsequent conduct resulting in the Indictment in the Hanlon case, the 624 case should not and cannot be used to support the aggravating circumstance of propensity in this case, the 518 case. To me prior conduct has to be conduct that occurred prior in time to this alleged crime. So with that exception I'm denying the Defendant's Motion to Strike Aggravating Factors. The rest of the factors under Idaho Code Section 19-2515(9) specifically E through and including F and G will stand. H will stand if it can be proven somehow with conduct in the commission of the murder at hand and not by reference to the Hanlon murder.

(Tr., p. 597, L. 23 – p. 598, L. 14); (R., p. 380, Ls. 18-21) ("Unless the State does make such an offer of evidence relating to conduct in the commission of the murder at hand, it

will not be able to support the aggravating circumstance of "propensity".) Trial counsel received from the Court the necessary factual findings they required for a successful motion; however, trial counsel failed to pursue a ruling on their actual claim as presented. Trial counsel's deficient performance prejudiced Petitioner because a ruling on the motion would have led to dismissal of the propensity aggravating circumstance.

8. Trial Counsel Rendered Ineffective Assistance Of Counsel In Failing To Raise Any Constitutional Grounds In Support Of Their Objection To Dennis Dean's Testimony Regarding Risk Assessment.

Dennis Dean is an employee of the Idaho Department of Corrections. He testified for the State regarding Petitioner's possible custody status if convicted on the murder charge and sentenced. Trial counsel objected to Mr. Deen's testimony as to risk assessment, and argued that the defense was precluded from questioning Mr. Deen without risk of "opening the door" to evidence of the Hanlon murder, and that there would be a denial of confrontation. (Tr., p. 4924, L.18 – p. 4936, L. 7.) At no time did counsel state the federal constitutional bases for the objection. Counsel should have rested the objection on the Constitutional grounds: the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. DEPRIVATION OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSELS' FAILURE TO ADEQUATELY LITIGATE ERRORS OCCURRING DURING THE GRAND JURY PROCEEDINGS.

Counsel should consider whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges include potential challenges to irregularities in grand jury proceedings. *See* ABA Guidelines, Guideline 10.10.2.A.

1. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Move To Dismiss The Amended Indictment On The Grounds That It

Charged An Additional Or Different Offense Than Initially Presented To The Grand Jury.

As noted above, trial counsel filed motions captioned, "Motion To Declare Idaho's Capital Sentencing Scheme Unconstitutional," (R., pp. 201-08), and "Motion To Strike/Dismiss Aggravating Circumstances." Both motions, rested, to varying degrees, on the premise that Idaho's aggravating circumstances are elements, or at least functional equivalents to elements, of the aggravated crime of capital murder and therefore must be charged by way of Grand Jury Indictment or Information. Trial counsel should have moved to dismiss the amended indictment, referred to as "Indictment Part II," on the **additional** grounds that it charged an additional or different offense than initially presented to the Grand Jury in violation of Petitioner's rights under Idaho statute and criminal rules, and constituted a violation of Article I, Section 8 of the Idaho Constitution and the Fourteenth Amendment (Due Process Clause) of the United States Constitution. Had trial counsel raised the issue then there is a reasonable probability that the outcome would have been different, as the indictment would have been dismissed.

Since the release of *Ring v. Arizona*, 536 U.S. 584 (2002) (herein "Ring"), and its progeny, it is uncontestable that aggravating circumstances are elements, or at least the functional equivalents of elements, of a separate and greater crime than that of murder of the first degree. Stated differently, the elements of the core crime of murder of the first degree are contained entirely in IC § 18-4003, while the elements, or their functional equivalents, of the aggravated crime of capital murder are set forth in IC § 18-4003 **plus** at least one aggravating circumstance contained in IC § 19-2515.

In a meandering and tortured manner, trial counsel endeavored to explain the constitutional underpinnings of *State v. Lovelace*, 140 Idaho 73, 90 P.3d 298 (2004).

Assuming counsel was pressed for time, simply inserting a block quote from *Lovelace* in their motions, with just a little added emphasis, would have been a good start to making a point that counsel struggled making throughout argument.[7]

> If the legislature defines some core crime then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. **The aggravating fact is an element of the aggravated crime.** *Id., citing Apprendi, supra* at 494 n. 19, 120 S.Ct. at 2365 n. 19, 147 L.Ed.2d at 457 n. 19 (Thomas, J., concurring). In *Sattazahn v. Pennsylvania,* 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), Justice Scalia reiterated the analysis from *Ring* holding that **aggravating circumstances** that make a defendant eligible for the death penalty **"operate as 'the functional equivalent of an element of a greater offense.'"** *Id.* at 111, 123 S.Ct. at 739, 154 L.Ed.2d at 599 *citing Ring v. Arizona,* 536 U.S. at 609, 122 S.Ct. at 2443, 153 L.Ed.2d at 576. **Characterizing "murder" as a distinct, lesser-included offense of "murder plus one or more aggravating circumstances," Justice Scalia outlined the relevance of facts or elements necessary to prove an offense to a jury**, for Sixth Amendment purposes, and facts or elements necessary to determine whether a defendant is being twice tried for the same offense in violation of the Fifth Amendment's Double Jeopardy Clause. *See id.* The Court, albeit not a majority, announced:
>
> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)." Thus, [*Arizona v.] Rumsey* [,467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984)] was correct to focus on whether a factfinder had made findings that constituted an "acquittal" of the aggravating circumstances; but the reason that issue was central is not that a capital-sentencing proceeding is "comparable to a trial," ... but rather that **"murder plus one or more aggravating circumstances" is a separate offense from murder "*simpliciter.*"** *Sattazahn v. Pennsylvania*, 537 U.S. 101 at 112, 123 S.Ct. 732 at 740, 154 L.Ed.2d 588 at 599 (plurality).

[7] Petitioner does not assert as an independent ground for relief based on his trial counsels' deficient writing skills, with the notable exception of their inability to federalize claims.

Lovelace, at 76, 90 P.3d at 301 (emphasis added). From this premise, trial counsel should have moved onto the statutory requirements of I.C. § 19-1420 which provides,

> An indictment or information may be amended by the prosecuting attorney without leave of the court, at any time before the defendant pleads, and at any time thereafter, in the discretion of the court, where it can be done without prejudice to the substantial rights of the defendant. An information or indictment cannot be amended so as to charge an offense other than that for which the defendant has been held to answer.

Idaho Criminal Rule 7 likewise requires that the indictment or information contain all "essential facts constituting the offense charged." *See also State v. Windsor*, 110 Idaho 410, 418 (1985). Accordingly, if an initial indictment does not contain all the elements of the offense **or** does not fairly inform the defendant of the charges against him **or** does not enable him to plead an acquittal or conviction, then it is insufficient. The State may amend an insufficient indictment; however – and here is the core of the claim missed by trial counsel – "any amendment which charges the accused with a crime of greater degree *or a different nature* than that for which the accused was bound over for trial by the committing magistrate is barred by the Idaho Constitution [Article I, Section 8]." *State v. Colwell*, 124 Idaho 560, 566, 861 P.2d 1225, 1231 (Ct. App. 1993)(emphasis in original).

Thus, the State amended the initial indictment to charge Petitioner with a greater, or at least a different, crime for which he was bound over by the committing magistrate. *See United States v. Allen,* 406 F.3d 940 (8th Cir. 2005)(en banc), *petition for cert. filed* (Sept. 29, 2005) (No. 05-6764) (holding that the submission of aggravating factors to the grand jury for inclusion in the indictment preserves the constitutionality of Federal Death Penalty Act prosecutions); *State v. Fortin,* 843 A.2d 974 (N.J. 2004) (holding that "murder is a distinct lesser-included offense of the greater offense of capital murder" and

that aggravating factors, as elements of capital murder, must be submitted to a grand jury and returned in an indictment pursuant to the New Jersey Constitution.) Accordingly, the motion should have been granted and the amended indictment dismissed as unconstitutional under Article I, Section 8 of the Idaho Constitution.

In addition, the failure of the government to follow its own established procedures dealing with amending indictments constituted a violation of his federal constitutional right to due process protected by the Fourteenth Amendment. *See e.g., Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir.1993) (1980) ("[W]here a state has provided a specific method for the determination of whether the death penalty shall be imposed, 'it is not correct to say that the defendant's interest' in having that method adhered to 'is merely a matter of state procedural law.'") (paraphrasing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Trial counsels' failure to move to dismiss the amended indictment on these additional grounds, flowing logically from trial counsels' premise for other motions, constituted deficient performance. But for trial counsels' deficient performance there is a reasonable probability that the outcome would have been different.

2. Trial Counsel Failed To Move To Dismiss Indictment On Ground That Grand Jury Failed To Find That Each Aggravator Outweighed Mitigation.

The Grand Jury returned an indictment amended to include four aggravating circumstances. However, an additional factual finding must be found to sentence Petitioner to a sentence greater than life without the possibility of parole. Specifically, it must be found that each aggravating circumstance outweighs the totality of the mitigating

circumstances presented. This requirement is a direct consequence of the rationale from the rule articulated in *Ring:*

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 600 (citing and quoting *Jones v. United States,* 526 U.S. 227, 243, n.6 (1999). *See e.g., Woldt v. People*, 64 P.3d 256 (Colo. 2003) (holding that the determination of whether aggravation outweighs mitigation is of the type of factual finding encompassed by *Ring*); *Johnson v. State,* 118 Nev. 787, 59 P.3d 450 (2002).

Under Idaho law, the maximum punishment for a defendant convicted of murder of the first degree **and** found to have committed at least one aggravating circumstance beyond a reasonable doubt is only life without the possibility of parole. This is because "maximum punishment" is defined as "the maximum sentence" that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (emphasis in original).

Under well-established Idaho law, the rule is that a defendant cannot be sentenced to death, even if aggravators are found, unless it is also found that the aggravating circumstances outweigh the mitigation. *See e.g., State v. Charboneau*, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989) ("We hold that the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust.") Unless this additional finding is made, the maximum punishment is life without the possibility of parole. Therefore, to constitute a legally sufficient indictment, the

Grand Jury must make this additional finding. Article I, Section 8, of the Idaho Constitution, I.C. § 19-1420; ICR Rule 7 (requiring that the indictment or information contain all "essential facts constituting the offense charged"); *State v. Windsor*, 110 Idaho 410, 418 (1985).

Since it impossible to present all possible mitigating circumstances at this early stage, the prosecutor must present any known mitigation to the Grand Jury for the weighing process. Such an obligation is consistent with the prosecutor's current obligations. *See Johnson v. Superior Court*, 539 P.2d 792 (Cal. 1975)(prosecutor's duty to expose exculpatory evidence to grand jury); *see also* 1 ABA Standards For Criminal Justice, § 3 – 3.6(b) (No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.) Trial counsels' failure to move to dismiss the amended indictment on these additional grounds, flowing logically from trial counsels' premise for other motions, constituted deficient performance. But for trial counsels' deficient performance there is a reasonable probability that the outcome would have been different.

3. Trial Counsel Rendered Ineffective Assistance Of Counsel By Failing To Object To The Interliniation Of "Drowning" As One Of Three Possible Causes Of Death And By Failing To Request A Unanimity Instruction At Trial.

The Grand Jury was not presented with evidence that drowning was a probable cause of the victim's death, and further, made no such finding. It violated Petitioner's rights to notice, to present a defense, to due process, and to heightened procedural safeguards in capital cases as protected by Article I, Section 8 of the Idaho Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution, for the Court to interliniate "drowning" as a cause of death absent sufficient evidence and findings by the Grand Jury.

Once multiple, alternative causes of death were alleged by Indictment, Petitioner asserts that the State had either dismiss the alternatives or present them all to a jury and bear the burden of proving a particular cause of death beyond a reasonable doubt. The jury verdicts however do not indicate which cause the jury believe led to the victim's death. Moreover, without a unanimity instruction, it is impossible to determine whether the jury unanimously agreed on the cause in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Because trial counsel has refused to cooperate with Petitioner's reinvestigation of this case, and because Petitioner is still awaiting a hearing on his Motion For Discovery, it is impossible at this time to fully state this claim, nevertheless, Petitioner asserts he has satisfied both prongs of *Strickland*.

C. PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS IMPROPERLY SHACKLED DURING THE COURSE OF HIS TRIAL.

Petitioner wore a "leg brace" during all court appearances. (Tr., p. 592.) According to the State, the brace was worn under clothing, but would lock whenever Petitioner stood and his leg would remain stiff, unless he pressed a button to the side of the brace that released it. (Tr., p. 592, Ls. 7-15.) Petitioner would have to push the button as he walked. (Tr., p. 593, Ls. 4-6.) This was a new device that the Court had never previously employed. (Tr., p. 592, Ls. 23-24.) The Court made no findings whether the device was visible and no findings whether the device was necessary. Petitioner

believes that the jurors were able to discern this devise and thus knew that Petitioner was in fact shackled.[8]

The Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination that restraints are justified by a state interest specific to the particular defendant on trial. *Deck v. Missouri*, 544 U.S. 622, __, 125 S.Ct. 2007, 2009 (2005) (citing *Holbrook v. Flynn*, 475 U.S. 560 (1986).) This basic rule embodies notions of fundamental fairness. *Deck*, 125 S.Ct. at 2011; *see also*, *Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy"). Visible shackling undermines the presumption of innocence, the related fairness of the factfinding process, the right to counsel and secure a meaningful defense, and the maintenance of a dignified juridical process that includes respectful treatment of the defendant. *Deck*, 125 S.Ct. at 2013 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1895))(presumption of innocence "lies at the foundation of the administration of our criminal law"); *Holbrook*, 475 U.S. at 569 (restraint suggests that the justice system itself sees "a need to separate a defendant from the community at large"); *Gideon v. Wainwright*, 372 U.S. 335, 340-341 (1963)(Sixth Amendment guarantees right to counsel in order to secure meaningful defense); *Illinois v. Allen*, 397 U.S. 337, 344 (1970)(shackling affronts the "dignity and decorum of judicial proceedings").

[8] Due to trial counsels' failure to adequately consult with Petitioner and the court-imposed restrictions on juror contact, he is unable to fully establish the factual basis for this claim.

The prohibition against shackling applies with equal force during the penalty phase of a capital trial. *Deck*, 125 S.Ct. at 2010-2014. Given the severity and finality of a death sentence, jury accuracy in making the decision between life and death is no less critical than the decision between guilt and innocence. *Deck*, 125 S.Ct. at 2014. The appearance of the offender during the penalty phase in shackles almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community--often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point." *Id.* It also almost inevitably affects adversely the jury's perception of the character of the defendant. *Id.* And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations--considerations that are often unquantifiable and elusive--when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Id.*, quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Here, because propensity was an aggravating factor, the shackles were especially prejudicial.

Absent adequate justification and findings regarding the specific circumstances of the case, visible shackling is inherently prejudicial. *Deck*, 125 S.Ct. at 2014-2016 (citing *Holbrook*, 475 U.S. at 568.) The effects cannot be shown from a trial transcript. *Deck*, 125 S.Ct. at 2015. Thus, the defendant need not demonstrate actual prejudice to make out a due process violation. *Id.* Rather, the State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained. *Id.*, (citing *Chapman v. California*, 386 U.S. 18, 24 (1967).) Because of the inherent prejudice caused by visible shackling, the trial court has an affirmative duty to make

written findings stating that either the shackles are not visible, or findings regarding the specific circumstances of the case that might justify visible shackling.

Absent written findings to the contrary, and because there is reason to believe that this new device made Petitioner's custody status and physical restraint apparent to the jurors, the use of the restraining device, absent a determination that they were "justified by a state interest specific to [that] particular trial," violated "a basic element of the 'due process of law' protected by" the Fifth and Fourteenth Amendments, and violated the presumption of innocence. *Deck*, 125 S.Ct. at 2012.[9] Moreover, the shackling device impermissibly affected the jury's determination of aggravating factors and the weighing of those factors, in violation of the Eighth Amendment as well as the constitutional provisions set forth above.

Petitioner cannot fully state this claim as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006, as well as depositions of trial counsel and permission to contact the jurors.

D. THE STATE COMMITTED MULTIPLE *BRADY* VIOLATIONS

Suppression of evidence favorable to an accused by the prosecution violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland,* 373 U.S. 83 (1963). Favorable evidence includes not only that evidence tending to exculpate the accused, but also any evidence adversely affecting the credibility of the government's witnesses, e.g.,

[9] The Court cannot now make the requisite factual findings based on its extra-record recollection without making itself a witness in the instant post-conviction proceedings. *See Dyas*, 317 F.3d 934, 936-937 (state court determination that jury could not have seen the shackles was unreasonable in absence of any inquiry to establish facts concerning what jury could see).

evidence that could be used for impeachment. *Giglio v. United States*, 405 U.S. 150 (1972). The prosecution must actively search out material in its files and in the files of related agencies reasonably expected to have possession of evidence favorable to an accused. *Kyles v. Whitley*, 514 U.S. 419 (1995).

1. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Norma Jean Oliver

On or about December 4, 1991, law enforcement arrested Norma Jean Oliver as a juvenile runaway. (Exhibit 2.) Following her arrest and incarceration at a juvenile detention facility, Ms. Oliver alleged that Erick Hall forcibly raped her the prior day. She was transferred to Intermountain Hospital, a psychiatric facility. Petitioner believes that Ms. Oliver was arrested based on information that he provided to law enforcement, establishing her whereabouts at the Sands Motel. Petitioner believes her false accusations of **forcible** rape were either in retaliation to her arrest, cover for another person, or the result of her mental illness. Petitioner was charged with two counts of forcible anal and vaginal rape. (Exhibit 3.) Subsequently, the anal rape charge was dropped, and the forcible vaginal charge was amended to statutory vaginal rape. (Exhibit 4, Exhibit 5.) Petitioner has always maintained that he and Ms. Oliver had consensual sex. However, Ms. Oliver, while pretending to be an adult, was only a minor. Accordingly, Petitioner pled guilty to statutory rape in State of Idaho v. Erick Hall, Ada County Case No. HCR18591. Petitioner spent five years in prison for his conviction, and an additional four years for an escape conviction during that incarceration.

Approximately twelve years after the statutory rape conviction, the State located Ms. Oliver for the purpose of prosecuting Petitioner for capital murder. The State used

Ms. Oliver to establish aggravating circumstances based on 1991 statement to the police that Petitioner choked and violently raped her. (Tr., p. 5454, L. 18 – p. 5457, L. 16.)

At Petitioner's sentencing, Ms. Oliver had great difficulty recalling events. Ms. Oliver admitted that she suffered from a chemical imbalance and was not taking her medication at the time she testified; however, she did not indicate the nature or extent of her mental health problems. (Tr., p. 4777, Ls. 2-7; p. 4780, Ls. 6-18; p. 4783, Ls. 17-18.) On direct examination, Ms. Oliver could not recall critical events relating to the statutory rape including whether Petitioner and she engaged in vaginal intercourse, though she did indicate that Petitioner penetrated her anally. (Tr. pp. 4756-4783); *see also* (Tr., p. 4760, L.15 ("I only remember bits and pieces"); p. 4761, L.18 ("I can't remember"); p.4762, Ls.4-5 (she met Petitioner at Mountain Billiards "I think, but I'm not sure"); p.4762, L.18 (she's "not quite sure" whether they sat around in the trailer at all); p.4763, L.24-25 ("I closed my eyes – I don't' know [what happened]. I can't remember"); p.4764, L.12 ("I can't remember [if she couldn't talk because Petitioner was strangling her]. I don't think I could."); p.4764, L.14 ("I don't know [if I was scared]."); p.4765, L.3 ("I can't remember [what it was like what I woke up.]"); p.4765, L.21 ("I can't remember"); p.4766, L.3 ("I can't remember), L.6 ("I can't remember), L.9 ("I don't know. I'm sorry"), L. 17 ("I'm not sure."); p. 4768, L.1 ("I don't know."), L.10 ("I don't remember); p.4769, L.7 ("I can't remember"), L.13 (witness does "not really" remember getting up the next morning); p.4771, L.3 (witness "can't really remember" being arrested at the Sands Motel); p.4771, L.6 (witness "can't really remember" getting put into back seat of police car at Sands Motel); p.4771, L.9 (witness "doesn't know" if she wound up at the

juvenile detention jail); p.4771, L.21 (witness "can't remember" meeting with police officer at Intermountain Hospital because "it's a blur").)

Ultimately, through leading questions, Ms. Oliver effectively testified that Petitioner raped her. In addition, Ms. Oliver described a number of injuries that she sustained when allegedly forcibly raped by Petitioner. Detective Daniel Hess, who later testified as the arresting officer in the statutory rape case, corroborated her description of injuries. However, these injuries were not noted contemporaneously with Detective Hess's 1991 report nor listed in the emergency room report. Neither the emergency room report nor Detective Hess's police report were used to cross-examine either witness.[10]

a. The State committed *Brady* violations by not disclosing documentation or information that Ms. Oliver suffers from Bipolar Disorder or other conditions tending to undermine her credibility as a witness.

In the course of Petitioner's reinvestigation of the case, Norma Jean Oliver has voluntarily disclosed that she suffers from Bipolar Disorder. As noted above, the record indicates that Ms. Oliver was not taking any medication at the time of her testimony at Petitioner's trial. Petitioner believes that likewise in 1991, when Ms. Oliver first made her allegations she was off medication.

Petitioner intends to show that Bipolar disorder is a treatable illness marked by extreme changes in mood, thought, energy and behavior. If left untreated, bipolar disorder tends to worsen, and the person experiences full-fledged manic and depressive episodes. Some symptoms of manic episodes include: grandiose delusions, inflated sense

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[10] Petitioner previously claimed that the prosecution and/or its agents failed to timely disclose requested medical records of Norma Jean Oliver. This was based on an initial one-time meeting with both Petitioner's trial counsel wherein they indicated that they had made repeated requests for Ms. Oliver's medical records. Trial counsels' belief was subsequently further reflected in the trial transcript.

of self-importance; racing speech, racing thoughts, flight of ideas; impulsiveness, poor judgment, distractibility; reckless behavior; and, in the most severe cases, delusions and hallucinations. One of the usual differential diagnoses for bipolar disorder is that the symptoms are not better accounted for by Schizoaffective Disorder and is not superimposed on Schizophrenia, Schizophreniform Disorder, Delusional Disorder, or Psychotic Disorder Not Otherwise Specified.

Petitioner asserts his case mirrors the facts in *Freeman v. U.S.*, 284 F.Supp.2d 217 (D. Mass. 2003), where a letter had been sent to the prosecuting attorney from a psychiatrist for the main and uncorroborated government witness in a criminal prosecution. The letter put the prosecutor on notice that the witness suffered from bipolar disorder, was currently in the midst of a major depressive episode, and would likely decompensate under rigorous questioning by attorneys, and that her medical and psychiatric problems would be seriously intensified by her participation in a trial. This information was not disclosed to the defense. The federal district court for the district of Massachusetts found that the evidence was material as required to establish a *Brady* claim arising from government's failure to disclose the letter.

In this case, Jay Rosenthal testified that the 1991 forcible rape charges were reduced to statutory rape because Ms. Oliver was "vulnerable," "fragile," "terrified," and "unable to effectively go on with the case in front of a jury" or withstand cross-examination based in part on the recommendation of her treatment providers, psychiatrist and caseworker. (Tr., pp. 4952-4954; p. 5953, Ls.12-25.) As far as Petitioner is aware, this information was not disclosed to the defense at the time he entered his plea bargain. Likewise, he believes it was not disclosed prior to his capital sentencing hearing. Further,

the State called Mr. Rosenthal prior to calling Ms. Oliver, thus keeping the defense in the dark about the reasons for the State amending the charges to statutory rape when they cross-examined Ms. Oliver.

Petitioner claims that the State was on notice of the full nature of Ms. Oliver's mental health problems, both in 1991 and 2004, yet failed to disclose this information to the defense. Evidence of Ms. Oliver's mental health problems is exculpatory evidence. Further such evidence is material because Ms. Oliver's testimony was critical in sentencing Petitioner to death. There exists a reasonable probability that without such evidence the jury would not have found the propensity aggravator beyond a reasonable doubt and would not have found that the other aggravating circumstances outweighed the mitigation without her testimony.

b. The State committed *Brady* violations by not disclosing the complete results of the sexual crimes examination and testing ("rape kit") conducted in the Norma Jean Oliver statutory rape case.

Petitioner cannot fully state this claim as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006, motion for depositions and due to restrictions on contacting jurors. Petitioner does however assert that the rape kit contains exculpatory evidence. Specifically, Petitioner states that the examination and testing showed that Petitioner did not have anal sex with Ms. Oliver and that there could be evidence indicating that Ms. Oliver had sexual intercourse after being allegedly forcibly raped by Petitioner.

c. The State committed *Brady* violations by not disclosing all photographic evidence that would have impeached the testimony of Norma Jean Oliver and Detective Daniel Hess and tended to show that Petitioner only committed the crime to which he pled, non-forcible statutory rape.

The photographic evidence in this case was the only contemporaneous evidence available at trial to corroborate the testimony of Ms. Oliver and Detective Hess regarding the degree of injuries allegedly inflicted upon Ms. Oliver by Petitioner. It was difficult to identify any injuries in the photographs utilized at trial, but impossible to say conclusively that the photos did not depict the injuries as described.

Petitioner has requested through discovery the original contact sheet of photographs taken of Ms. Oliver. Petitioner asserts that the contact sheets or other photographs requested will demonstrate that Ms. Oliver and Detective Hess were either confused about the nature of the injuries, or were intentionally misleading.

d. The State Committed *Brady* Violations By Not Disclosing Evidence Suggesting That Norma Jean Oliver Was Incompetent To Testify.

As noted above, Ms. Oliver had tremendous difficulty recalling events to which she was called to testify. Petitioner incorporates by reference Claim – above. Indeed, Ms. Oliver's testimony was so disconnected from surrounding facts and circumstances that trial counsel could not conduct a meaningful cross-examination as guaranteed by the Sixth and Fourteenth Amendments. Ms. Oliver's testimony was so jumbled and incomplete that it lacked the reliability necessary for introduction of evidence in a capital sentencing proceeding under the Eighth and Fourteenth Amendments and denied him his rights to due process under the Fifth and Fourteenth Amendments. Not only was Ms. Oliver's testimony incomplete in court, Petitioner has recently learned through his reinvestigation of the case that when Ms. Oliver was contacted by the State to testify in the underlying criminal case, her memory of the events twelve years earlier was completely lacking. It was only through repeated readings of police reports that Ms. Oliver was able to even piece together what she presented to the jury.

The State should have disclosed the full extent of Ms. Oliver's memory problems to the defense. Had the State done so, then trial counsel could have successfully precluded her testimony in its entirety, or otherwise effectively cross-examined her on her near complete lack of memory prior to being contacted by the State. Accordingly, the failure to disclose this information constituted a *Brady* violation and requires reversal of Petitioner's death sentence.

Petitioner cannot fully state this *Brady* claim and its subparts as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.[11]

e. The State Committed *Brady* Violations By Not Disclosing Incentives Given To Ms. Oliver To Testify.

Petitioner has learned through his reinvestigation of the case that Ms. Oliver was not compelled by subpoena to testify as a witness for the State. Instead, Petitioner believes that the State flew Ms. Oliver from West Virginia and provided her meals and lodging while in Boise. Petitioner cannot fully state this claim at this time, and reserves the right to withdraw this claim upon completion of his investigation including receipt of any court-ordered discovery following the hearing scheduled in June 2006.

2. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To April Sebastian

[11] It is worth noting that elsewhere in his amended petition, Petitioner also claims that: (1) Ms. Oliver was incompetent to testify; (2) trial counsel rendered ineffective assistance in failing to fully investigate, or re-investigate, Ms. Oliver's allegations; (3) trial counsel rendered ineffective assistance in failing to move to strike, or otherwise preclude, consideration of Ms. Oliver's testimony [based on her incompetence]; (4) trial counsel rendered ineffective assistance in failing to impeach Ms. Oliver with information in their possession, and disclosed in discovery but never reviewed by counsel; and (5) the State committed multiple *Napue* violations by failing to correct false and misleading testimony of their witnesses.

April Sebastian testified against Petitioner at his sentencing. At the time of her testimony, she was actively represented by Petitioner's trial counsel, Amil Myshin, in her upcoming "rider" hearing in the case of State of Idaho v. April Sebastian, Ada County case no. H0400228. (Tr., pp. 4868-70; pp. 4875-96.) At the time of her testimony, Ms. Sebastian also had another active case, State of Idaho v. April Sebastian, Ada County case no. H0400335//M0401584. Following her testimony, Ms. Sebastian appeared for her "rider" hearing with her counsel, Amil Myshin. The district court presiding over the case granted her probation **based on a recommendation from the State.**

Petitioner has reasonable grounds to believe that the State offered Ms. Sebastian benefits in her other cases in exchange for her testimony against Petitioner. For instance, based on a review of court documents, Ms. Sebastian was not a good candidate for probation, appearing to have failed on probation twice previously. The extent to which the State offered Ms. Sebastian benefits in exchange for her testimony is still being investigated. Further, Petitioner cannot fully state this claim as he is still awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006. Nevertheless, at this time, Petitioner asserts that the State violated *Brady* and such violations warrant reversal. Petitioner reserves the right to withdraw this claim upon completion of his investigation.

3. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Michelle Deen Regarding Her Prior Criminal Convictions, Her Past Attempts To Broker Deals With The Police To Avoid Prosecution, And Her Compromised Mental Health As Reflected In By Court-Ordered Substance Abuse And Psychological Examinations.

Ms. Deen testified against Petitioner at his sentencing. (Tr., pp.4813-39.) Petitioner has discovered through his reinvestigation that Ms. Deen was convicted of at least two felonies, only one of which was elicited at trial.

The State had an obligation to disclose Ms. Deen's full criminal record including both felony convictions stemming from the cases of State of Idaho v. Michelle Deen, Ada County case no. H0301398 and State of Idaho v. Michelle Deen, case no. H0200584. The State's apparent failure[12] to provide Ms. Deen's full criminal history to trial counsel constitutes a *Brady* violation warranting reversal.

In addition, Petitioner's reinvestigation of the case has uncovered the fact that **at least in one prior incident** Ms. Deen has attempted to broker deals with the State, through its agents, to avoid prosecution or to obtain leniency. Specifically, in the course of review Ms. Deen's files at the Ada County Courthouse, Petitioner has found a handwritten note among other court documents stating:

> 2-9 – narc. arrest made by patrol. D arrested at 18.4 g meth (+). D wanted to talk to police re: "deal." D said meth not hers & didn't want to go down on someone elses dope. D then failed to contact cops after they spoke. 2 syringes found w/ dope

(Exhibit 6.) This appears to be a note, reflecting the circumstances surrounding Ms. Deen's arrest on February 9, 2002, for multiple drug-related offenses, including felony possession of a controlled substance, State v. Deen, Ada County case no.

[12] Petitioner's counsel is forced to assert an **apparent** *Brady* violation because based on his review of trial counsels' files and the lack of evidence presented at trial, it appears this information was not disclosed. However, Petitioner cannot assert with absolute certainty that the State did not disclose the information for three reasons: (1) Petitioner has not yet received all of trial counsels' files and notes; (2) the trial counsel has improperly refused to adequately consult with Petitioner despite his many requests; and (3) the State has objected to Petitioner's Motion For Discovery.

M0203902/H0200584. The State's apparent failure to provide Ms. Deen's prior attempts to curry favor with State agents constitutes a *Brady* violation warranting reversal.

Finally, Petitioner has discovered in his reinvestigation of the case that that Ms. Deen underwent court-ordered substance abuse **and** psychological evaluations in the case of State v. Deen, Ada County case no. No. H0301398/M0311644. The State's apparent failure to provide Ms. Deen's full criminal history to trial counsel constitutes a *Brady* violation warranting reversal.

Petitioner cannot fully state this claim as he is still conducting his investigation and is awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

4. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Rebecca McCusker.

Petitioner reported Rebecca McCusker to the Idaho Department of Health and Welfare for allegations of child neglect and/or abandonment. Petitioner believes that corroborating records could establish a motivation for Ms. McCusker to retaliate against Petitioner by exaggerating or lying in her testimony at Petitioner's sentencing. These records are in the State's possession. Petitioner cannot fully state this claim as he is still investigating this claim and is awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

5. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Evelyn Dunaway.

Petitioner cannot fully state this claim as he is still investigating this claim and is awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

6. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To Wendy Levy.

The State interviewed Wendy Levy in preparation for their sentencing case. (Exhibit 7.) Ms. Levy provided evidence to the State that was exculpatory. Accordingly, the State found nothing helpful from Ms. Levy and chose not to call her as a witness.

The evidence provided to the State included, but was not limited to, evidence regarding Erick Hall's positive, non-violent relationships with previous girlfriends. This evidence was exculpatory because it tended to mitigate against imposition of the death sentence **and** it undercut the State's argument that Petitioner has a propensity to murder based on a history of violent sex crimes against former girlfriends. The State had an affirmative obligation to disclose this evidence to the defense. None of that evidence was provided. The State's *Brady* violation warrants reversal of Petitioner's death sentence.

7. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Pertaining To A Potential Alternate Perpetrator.

The State was in possession of evidence that suggested the possibility of an alternate perpetrator of the homicide. As even the State recognized, at least when outside the presence of the jury, the DNA evidence that linked Petitioner to rape did not establish that he also killed Ms. Henneman. The State did however argue, based on their expert's testimony, that the DNA sample taken from Ms. Henneman was the sample of just one perpetrator, Erick Hall. Thus, the State argued that there was only one perpetrator of rape, and therefore one perpetrator of the murder.

During these post-conviction proceedings, Petitioner has established that the DNA evidence actually shows that there was more than one perpetrator involved in the crime of

rape. (Exhibit 8.) Petitioner has always maintained, and continues to maintain, that he did not kill Ms. Henneman. Petitioner asserts that the secondary contributor to the DNA may have been the actual killer. During the course of this reinvestigation, Petitioner has identified one possible person as the source for the DNA evidence not yet matched. That person, Patrick Hoffert, is deceased.

According to police reports, Lisa Lewis and Peggy Hill told Detective Dave Smith and Scott Birch of the Attorney General's Office that they had seen and spoken with Lynn Henneman near the Greenbelt on the night she was abducted. (Exhibit 9.) Ms. Lewis indicated that Ms. Henneman asked for their assistance on directions to the DoubleTree Inn. According to Ms. Lewis, Petitioner and Patrick Bernard Hoffert then arrived, at which point Petitioner spoke briefly to Ms. Henneman. Ms. Hill reported noticing Ms. Henneman's yellow sapphire ring and recalled that Petitioner left with Ms. Henneman.

The State did not call either Ms. Lewis or Ms. Hill to testify despite that fact that on the surface, their testimony would appear incriminating of Petitioner. The reason the State did not call these witnesses is because there is more to the story. Specifically, the morning after Ms. Henneman's abduction, Patrick Hoffert, the other individual placed with Ms. Henneman the night before, committed suicide. (Exhibit 10.) An investigation was conducted both by the Garden City Police Department and the coroner's office.

Through reinvestigation of this case, Petitioner has obtained the affidavits of Ms. Lewis and Ms. Hill, who confirm the information in the police reports. (Exhibit 11, Exhibit 12.) Further, Ms. Lewis indicates that Deirdre Muncy, Patrick Hoffert's former girlfriend, told her that prior to committing suicide Patrick stated that, "he raped the

girl."[13] When Ms. Lewis attempted to bring this information to the attention of the Garden City Police, she was told to mind her own business. Ms. Lewis also indicates that several years later she positively identified the woman she met as Lynn Henneman through a photographic array given to her by Detective Dave Smith of the Boise Police Department. Ms. Hill was also contacted by Detective Smith, but with no follow-up. This information does not appear in trial counsels' files and was not presented at the trial.

Petitioner cannot fully state this claim as he is still investigating the degree of information known but withheld by the State and further is awaiting a hearing and ruling on his Motion For Discovery, filed January 5, 2006.

8. The Prosecution Violated *Brady* By Failing To Disclose Favorable Evidence Connecting Christian Johnson To The Henneman Homicide.

Christian Johnson was the State's prime suspect in the Henneman homicide for numerous months. Based on the amount of time he was under investigation, Petitioner believes there are numerous documents and other information not contained in trial counsels' files, which should have been disclosed by the State if those documents or information inculpated Mr. Johnson. Evidence tending to identify someone else as the perpetrator is exculpatory and material. *Grube v. Blades*, 2006 WL 297203 (D. Idaho 2006)(slip copy, memorandum order).

Petitioner is still investigating this claim and reserves the right to withdraw it upon completion of his reinvestigation of the case.

E. THE STATE COMMITTED NUMEROUS *NAPUE* VIOLATIONS

[13] Deirdre Muncy denied this assertion, but that alone, does not make the evidence inadmissible or irrelevant at a capital sentencing proceeding, especially in light of the other odd circumstances involving Mr. Hoffert that remain.

The deliberate deception of a court and jurors by the presentation of evidence known to be false violates the Fourteenth Amendment. The same result obtains when the government, although not soliciting false evidence, allows it to go uncorrected when it appears. *Giglio v. United States*, 405 U.S. 150 (1972). In other words, the state cannot create a materially false impression regarding the facts of the case or the credibility of the witnesses. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), the Supreme Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942). In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court stated that, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269; *see also Giglio v. United States*, 405 U.S. 150, 153 (1972)

Prosecutor falsehoods alone do not automatically entitle a petitioner to relief. Relief is compelled when the false impressions are "material," which means when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 394 U.S. 103 (1935). The record must suggest a reasonable likelihood that during deliberations the jurors could have considered the false evidence or argument.

1. The Prosecutor Elicited Materially False Testimony From Dennis Dean Regarding Idaho Department of Corrections Inmate Classification System, Directives For Classification And Conditions Of Confinement.

During the sentencing trial, the State created a materially false impression of how the Idaho Department of Corrections (IDOC) would determine Petitioner's custody

status, and the conditions of confinement to which Petitioner would be subjected. At sentencing, the State called Dennis Dean, the Inmate Records Placement Manager with the IDOC. (Tr., p. 4904, Ls. 9-11.) Mr. Dean described the initial classification process for offenders, and explained that classification was a "risk assessment" done to determine how best to house an inmate. (Tr., p. 4906, L. 24 – p. 4907, L. 6.) The State elicited testimony that the IDOC system has three prison levels of "secured" facilities—maximum, medium, and minimum—and other non-secured facilities such as work centers. (Tr., p. 4905, L. 17 – p. 4906, L. 1.)[14]

The prosecutor deliberately and repeatedly elicited materially misleading information from Mr. Dean suggesting that Petitioner, if sentenced to life without the possibility of parole, could be housed at a minimum custody facility:

> Q. Okay. So if a person were, say at the medium security facility and they were misbehaving, showing disrespect to staff or breaking things or doing a variety of other rule violations, they could get more points and go to maximum security?
>
> A. Yes.
>
> Q. Then, over time, if they behaved and did certain things, they could lose points and ultimately go to minimum custody?
>
> A. Yes, those points – detention points would fall off after a year.

(Tr., p. 4911, Ls. 6-15) The prosecutor asked about conditions at minimum secured facilities, and elicited that inmates at those facilities can work on "fire fighting crews []

[14] This information alone is incorrect. According to IDOC, there are at least 5 levels of custody. (Exhibit 13.) (IDOC Offender Classification). Furthermore, Mr. Dean's claims or implications that classifications are based on purely "objective" criteria are false. (Tr., p. 4907, Ls. 9-10) (Exhibit 14.) Petitioner does not at this time have access to all of the necessary IDOC policies, nor does Petitioner have access to the "IDOC Male Offender Custody Classification User Manual," but will request those policies and manual in an amended discovery motion if not voluntarily disclosed by the IDOC.

that work out of that facility," can work on "road crews," "have the opportunity to work outside," have access to "a therapeutic community," and can attend classes." (Tr., p. 4915, Ls. 9-25) This examination was designed to deliberately mislead the jury into believing that Petitioner would be eligible for minimum security despite first degree murder, rape, and kidnapping convictions, using the assumption that the Petitioner would receive a life without parole sentence. (Tr., p. 4949, L. 22- p. 4950, L. 8.)

The State did finally elicit testimony on redirect examination that Petitioner would not be eligible for minimum custody under the current IDOC classification system. However, the State immediately pointed out that the classification system is not state law, but merely IDOC policy, and that "from time to time points and classifications have to change based on prison populations and crowding and various like that." (Tr., p. 4950, Ls. 4-7) It is improper to rely on speculative future housing policy changes to obtain a sentence of death. Overall, the State left the jurors with the overwhelming, and incorrect, impression that Petitioner could be eligible to live in a minimum secured facility at some point, which is not the case. The prejudice was especially acute because the State drew attention to the fact that Petitioner's escape in 1994 was from a minimum secured facility. (Tr., p. 4920, Ls. 18-25.)

The State also improperly and prejudicially implied that Petitioner would eventually be housed in "country-club-like" conditions. Mr. Dean testified that the medium secured facility was "like a little town," "something like a college campus," with a gymnasium, dining room, chapel, where inmates could go to work, play at the ball field, earn wages, attend college classes, and live in a therapeutic environment. (Tr., p. 4913, L.18 – p. 4915, L. 6.) According to the IDOC Directive 303.02.01.001, however,

"medium custody" offenders "shall be held within the confines of a secure perimeter," movement "shall be structured and monitored," and inmates "shall normally be under continuous armed staff supervision and in restraints" whenever outside the facility. The IDOC medium security facility is surrounded by multiple layers of razor wire, attack dogs, and armed guards.[15] The State's presentation of Petitioner's "conditions of confinement" if sentenced to life without parole is extremely misleading, irrelevant to the jury's sentencing determination, and highly prejudicial in that it encouraged the jury to make its sentencing determination based on improper, irrelevant, and incorrect information. There is a reasonable likelihood that the false and misleading testimony could have affected the judgment of the jury.

2. The Prosecutor Deliberately Created The Materially False Impression That Petitioner Seriously Choked Evelyn Dunaway While Engaging In Sexual Intercourse.

The State argued at sentencing that Petitioner's history with girlfriends and other women established his propensity to commit murder. In support of its propensity theory, the State called Petitioner's former girlfriend, Evelyn Dunaway, to testify. The State's questioning of Ms. Dunaway was materially misleading and unduly prejudicial.

The State's examination of Ms. Dunaway was designed to and did leave the impression that Petitioner seriously choked Ms. Dunaway while having sexual intercourse with her:

Q. Okay. Would that have been in March of 2002?

A. Possibly.

[15] Through discovery, Petitioner intends to offer further evidence of the lack of decent conditions, lack of programming, lack of exercise, lack of job training, and the unlikelihood that Petitioner will ever be assigned to medium custody.

Q. All right. Was that the end of the relationship then?

A. It was.

Q. Okay. Was there another time before that when Erick choked you with his hands?

A. Yes.

Q. Where did that take place?

A. In our bedroom.

Q. At that same trailer?

A. Yes.

Q. Why was he mad at you that day?

A. I don't remember.

Q. Okay. How serious was the choking? Was it --

A. It was serious.

Q. Tell us what happened, that you remember?

A. There was a couple times -- I don't remember.

Q. Was it bad enough to scare you?

A. Yes.

Q. I mean did he come up from behind you, or sit on you, or how did it work?

A. He would sit on me.

Q. **I just need to ask you one other area**, Evelyn, that I don't care to ask you but I need to anyway. While you were living there with him in the trailer for those months did you have a sexual relationship with him?

A. We did.

Q. I just need to know kind of in terms of frequency. Was -- how often was there sexual intercourse between you?

A. Daily.

Q. Was it sometimes more than daily?

A. Yes.

Q. Was that of your -- of your instigation or his? Did he want sex --

A. Sometimes both but more him.

(Tr., p. 4846, L. 1 – p. 4947, L. 16)(emphasis added).

Given that the victim, Lynn Henneman, was purportedly raped and choked to death, the connection the State wished the jury to infer is obvious: Petitioner has a propensity for choking women while having sex. However, Ms. Dunaway never testified that Petitioner choked her while having sex. Rather, the prosecutor deliberately asked questions in such a way that the jurors would naturally make the connection between sexual intercourse and choking, despite the fact that he was inquiring about two separate areas. (Tr., p. 4847, L. 2 (informing the witness that they were now transitioning to a different area of questioning).) Indeed, in Petitioner's reinvestigation of the case, Ms. Dunaway has confirmed that Petitioner never choked her while having sex. (Exhibit 15.)

There is a reasonable likelihood that the false and misleading testimony could have affected the judgment of the jury.

3. The Prosecutor Deliberately Created The Materially False Impression That Petitioner Choked Michelle Deen While Engaging In Forcible Sexual Intercourse.

In further support of its propensity theory, the State called Petitioner's former girlfriend, Michelle Deen, to testify. As with Ms. Dunaway, the State's questioning of Ms. Deen was materially misleading and highly prejudicial to Petitioner.

The State's examination of Ms. Deen was designed to and did leave the impression that Petitioner choked Ms. Dunaway while having forcible sexual intercourse with her:

> Q. Now, I hate to be indelicate and I -- but I told you I was going to have to be some and so I need to ask you about your sexual relationship with the defendant.
>
> Who decided when and where and how and such as that in terms of when you were going to have sexual relations?
>
> A. Erick did.
>
> Q. And how did he decide that, I mean, and how did he convey that to you?
>
> A. It just pretty much when he wanted it, it was right then and there.
>
> Q. Did it matter if you said no?
>
> A. It didn't matter.
>
> Q. If you did say no, what would happen?
>
> A. It would still happen. It would be pretty much take my clothes off and have sex.
>
> Q. Did he ever have to use force on you to get you –
>
> A. He's a very strong man. I couldn't fight Erick back if I wanted to.
>
> Q. Did there come a point when, you know, August when he put you in a headlock over something that had come up?
>
> A. He put me in a headlock, and I can't remember the situation why he put me in a headlock. He had me in a headlock on the couch and he told me that if I yelled or moved that all he had to do was to twist my neck and he could kill me. And he told me not to tell nobody about this, about our situation or he'd kill me.
>
> Q. Okay. How hard did he squeeze?
>
> A. It was very forceful. It hurt really bad. I couldn't move. I was too scared.
>
> Q. Did -- (brief delay.) Did it interfere with your breathing?

A. I couldn't breathe that well after he did it. You know, during the time he did it it was hard for me to breathe and I didn't want to move or say anything, because I didn't want to die.

Q. Okay, now. When you -- after this all happened, did you decide to leave?

A. Yes, I did. Erick went to bed -- we went to bed one night, he got sound to sleep and I snuck out and left.

(Tr., p. 4820, L. 22 – p. 4822, L.16). The prosecutor thus "linked" sexual intercourse and choking. The witness never testified that Petitioner choked her during sex, yet the prosecutor's questioning was designed to connect sexual activity with force. Given that the victim, Lynn Henneman, was purportedly raped and choked prior to her death, the connection the State wished the jury to infer is obvious. There can be no doubt that the erroneous conclusion the prosecutor calculated jurors would draw was material, given the allegations about the manner of Ms. Henneman's death.

4. The Prosecutor Elicited Materially False Testimony From Norma Jean Oliver.

In support of its propensity argument, the State relied heavily upon allegations that Petitioner forcibly raped Norma Jean Oliver in 1991. Petitioner was originally charged with two counts of forcible anal and vaginal rape of Ms. Oliver. (Exhibit 3.) Subsequently, the anal rape charge was dropped, and the forcible vaginal charge was amended to statutory vaginal rape. (Exhibit 4.) Petitioner pled guilty to vaginal statutory rape. During Ms. Oliver's testimony at the sentencing trial in the instant homicide case, the State repeatedly elicited materially false testimony regarding the 1991 rape case.

First, the State elicited testimony it the State itself had not found credible when it elicited testimony from Ms. Oliver suggesting that Petitioner had anally raped her in December 1991. (Tr., p. 4767, Ls. 5-7 ("[h]e started having anal sex with me and I told